Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CECILIA LACKS,
Petitioner,

v.

FERGUSON-FLORISSANT REORGANIZED
SCHOOL DISTRICT, R-2,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

JEREMIAH A. COLLINS *
LEON DAYAN
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Where a public school teacher is terminated for speech that she could not reasonably have understood to violate a school district policy, is the First Amendment requirement of reasonable notice satisfied merely because it is linguistically possible to construe the district's policy as prohibiting the speech in question?

2. Where an employee would not have been terminated but for the racial animus of supervisors who played a crucial role in the termination process, does the fact that the ultimate termination decision was made by a body which was not itself racially motivated preclude holding the employer liable under Title VII?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 147 F.3d 718 (8th Cir. 1998), and is reprinted at App. 1a-15a. Judge McMillian wrote an opinion dissenting from the denial of rehearing en banc, reported at 153 F.3d 904 (8th Cir. 1998) and reprinted at App. 16a-36a. The opinion of the District Court for the Eastern District of Missouri on issues decided prior to trial is reported at 936 F. Supp. 676 (E.D. Mo. 1996), and is reprinted at App. 37a-54a.

JURISDICTION

The Court of Appeals entered judgment on June 22, 1998 and denied rehearing and rehearing en banc on September 17, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution provides in pertinent part that: "[n]o State . . . shall . . . deprive any person of life, liberty, or property without due process of law."

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a), 2000e(b), provides in pertinent part as follows:

> It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . .

> The term "employer" means a person engaged in an industry affecting commerce . . ., and any agent of such a person.

STATEMENT OF THE CASE

A. Overview

Petitioner Cecilia Lacks was an award-winning tenured teacher who had been employed for more than twenty years by Respondent Ferguson-Florissant Reorganized School District ("District") when the District terminated her employment on March 23, 1995.

The stated reason for the decision to discharge Lacks was that she had not disciplined students who, in response to a drama-writing exercise that Lacks had assigned, wrote and read aloud in the classroom from scripts in which the fictional characters created by the students uttered profanity. According to the District, in refraining from meting out discipline to the students, Lacks improperly failed to enforce a prohibition against profanity set forth in the District's Student Discipline Code—a prohibition that, prior to Lacks' discharge, had not been applied or been understood to apply to profanity used in a work of fiction or creative writing, but only to profanity that students directed at other persons in real-life interactions.

Two claims are at issue in this Petition: (i) a First Amendment claim brought pursuant to 42 U.S.C. § 1983, on the theory that the termination was unconstitutional because Lacks was not on reasonable notice that the expressive activity for which she was terminated was prohibited by District policy;[1] and (ii) a Title VII claim

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[1] In addition to the First Amendment claim that is the subject of this petition, Lacks also presented to the jury a distinct First Amendment claim predicated on the theory that, even if she had received adequate notice, the District's decision to terminate her was not reasonably related to legitimate pedagogical concerns. The jury decided in her favor on this claim, but the Eighth Circuit set the verdict aside. App. 11a-12a. Certiorari is not sought as to this issue.

brought pursuant to 42 U.S.C. § 2000e *et seq.*, on the theory, *inter alia*, that supervisors who played crucial roles in the termination process were motivated by racial animus, and but for that racial animus, Lacks would not have been terminated.[2]

Both the First Amendment notice claim and the Title VII race discrimination claim were tried to a jury. On the notice claim, the jury found in favor of Lacks, answering "no" to a special interrogatory that asked, "Did plaintiff have reasonable notice that allowing students to use profanity in their creative writing was prohibited?" On the Title VII claim, the jury was asked (i) whether Lacks had proven "by a preponderance of the evidence" that "plaintiff's race was a motivating factor in her termination," and (ii) whether the defendant had "proven by the preponderance of the evidence that defendant would have discharged Lacks regardless of her race." The jury decided in Lacks' favor on both questions, answering the first question "yes," and the second question "no."

The District Court entered judgment for Lacks on these claims in accordance with the jury's verdict. The Eighth Circuit, for reasons set forth *infra* at 13-14, reversed and ordered that judgment notwithstanding the verdict be entered in favor of the District. Petitioner requested rehearing en banc, which the Eighth Circuit denied over the dissent of Judges Theodore McMillian and Morris Sheppard Arnold.

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[2] Lacks also brought a state-law claim that her discharge violated the Missouri Teacher Tenure Act, Mo. Ann. St. § 168.114.1. The District Court decided that claim in her favor, *see* App. 44a-48a, but the Eighth Circuit reversed. App. 6a-9a. Lacks does not petition for certiorari as to that claim.

This action originally was filed in state court but was properly removed by respondents. App. 5a.

B. Statement of the Facts [3]

1. In October 1994, Lacks gave the students in her eleventh grade English class, who were studying a unit on drama, an assignment that required four groups of students to write plays about themes that were important to them, using dialogue natural to the characters created. Tr. 410.[4] The students were then to read in the classroom from the scripts they had written, and those classroom presentations were to be videotaped so that the students could see themselves speak and thereby work to improve their oral presentation skills. Tr. 416.

Lacks did not encourage the students to use profanity in the plays. Tr. 411. However, three of the four student groups prepared scripts touching on themes such as gang violence and inter-gang romances, and those scripts contained a great deal of profanity, including the word "fuck," as well as frequent uses of the word "nigger." [5] At least in part, the students were writing on matters known to them from experience. Karen Price, the Chairman of the English Department at Berkeley High School, where Lacks taught, testified that "many of our students have experienced violence in their lives. I personally know that in real life, one of the students on the video was arrested on a drug charge. In real life, one of the male students witnessed a random shooting of a child by warring gangs." Tr. 953.

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[3] Because the two claims at issue were decided in Lacks' favor by a jury, the court below acknowledged that, on review, the court was required to credit the testimony of Petitioner's witnesses and to accept as true all of the evidence adduced at trial that was favorable to Petitioner. App. 13a. We do the same in this Statement of Facts.

[4] We cite to the trial transcript as "Tr.," and to the transcript of the School Board hearing as "Hrg. Tr." Trial Exhibits are cited as "Exh.," and exhibits introduced at the School Board hearing are cited as "Hearing Exh."

[5] All of the students in Lacks' English class were African-American, as was 98% of the student body of Berkeley High School. Tr. 1401.

2. A District policy—Policy 3043—required "all employees of the district," including teachers, to "share responsibility for supervising the behavior of the students and for seeing that they meet the standards of conduct" set forth in the District's "Student Discipline Code." Exh. 96 at 55.

The Student Discipline Code prohibited "[s]tudent behavior that is disorderly or unacceptable," and it listed the following examples of such "behavior":

> tardiness, unexcused absence, leaving school grounds without permission, cheating, fighting, theft, gambling, use of tobacco products in unauthorized areas, forgery, littering, profanity, insubordination, refusal to identify self to school officials, verbal abuse, refusal to comply with directions of staff, class disruption, inappropriate dress, obscene gestures, lying to school authorities, inappropriate physical contact between students, possession of glass bottles, and any other inappropriate behavior as defined by school officials.

Id. at 109.

3. Prior to Lacks' case, there were numerous instances, occurring over a period of many years while the Student Discipline Code was in effect, in which high school students in the District, with the awareness of District administrators, had used profanity in their creative writing. There were no cases, however, in which a District administrator had ever suggested that the Student Discipline Code applied to profanity in that context, much less were there any cases in which the District had imposed any discipline, either on the students involved or on the teachers.

On at least two earlier occasions, students in Lacks' classes had read poetry containing profanity, including the word "shit" and the word "nigger," in the presence of a school administrator, who did not raise any objection. Tr. 505-06, 512-13, 841. Indeed, on one of those occasions the administrator wrote a positive evaluation of the day's lesson, stating that the lesson was "effective and in-

teresting" and that he "was impressed by the fact that the students were not reluctant to share their writing," which he attributed to the "supportive atmosphere [Lacks] created in the class." Tr. 513. On another occasion, one of Lacks' students wrote a short story containing profanity, and, despite the profanity, the story was displayed without objection on the library wall. Tr. 378-79.

On still another occasion, a student of another teacher in the District wrote a play called "Everything You Always Wanted to Know About Sex But Were Afraid to Try," and named the characters Freddy Fuck, Peter Prick, Sally Slut, and Penny Prude. Tr. 2043-44. The assistant principal read the play and "just laughed about it"; he disciplined neither the student nor the teacher. Tr. 2044. (The teacher had given the student an "A" grade for the play.)

In addition, Vernon Mitchell, the principal of Berkeley High School and the person who initiated the disciplinary proceedings against Lacks, did not discipline the students or the teacher involved in a 1992 student-written school-sponsored play that, by Mitchell's own admission, contained profanity; on the contrary, Mitchell went on stage to publicly congratulate the students and the teacher after a performance of the play for parents and the community at large. Tr. 1380, 1383-86. In addition to profanity, that play, called "How Ya Livin'," contained a depiction of a gang member desecrating the body of a victim of violence, as well as sexually suggestive dancing and a scene featuring a student actor lewdly pulling on his crotch and referring to it as his "thang." Exhs. 247, 248. The teacher who sponsored "How Ya Livin'," Sharita Kyles, is an African-American, as is Mitchell. Lacks is white.

4. It was undisputed that Lacks diligently enforced the Student Discipline Code when she encountered students using profanity in their interactions with others. Tr. 451-52, 1037. But the understanding not only of Lacks, but of other District teachers prior to Lacks' case, and of administrators as well, was that the Student Discipline

Code did not apply to profanity used by students in their creative writing.

Thus, Karen Price, the Chairman of the English Department at Berkeley High School, testified as follows in response to a question asking her to state her understanding of the Student Discipline Code:

> A. I did not think it was related to creative writing or reading of literature. I thought it had to do with student *behavior*.
>
> Q. Would you say that a student writing creative writing in the classroom no matter what language is contained in the writing, do you feel that student would be necessarily misbehaving because they include street language?
>
> A. I don't think they are misbehaving.
>
> Q. What do you think they are doing?
>
> A. I think that they are trying to put words in a character's mouth that reflect what kind of person they are writing about. . . .
>
> Q. Have you ever known of a teacher to be disciplined for what was contained in a student's creative writing?
>
> A. No.
>
> Q. Or for profanity or street language contained in the student's creative writing in the classroom.
>
> A. Never.

Tr. 963-64 (emphasis added).

Two District *administrators* testified to the same effect.[6] Indeed, the only person who claimed to believe that the

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[6] Dr. Larilyn Lawrence, the District's Curriculum Coordinator for Reading and Language Arts, testified as follows:

> Q. . . . [A]re you aware of any policy or rule in the Ferguson Florissant School District that prohibits teachers in the classroom from allowing students to include street language in their creative writing?
>
> A. No, I am not.
>
> * * * *

[Continued]

Student Discipline Code applied to profanity in students' classroom works was one of the administrators who made the decision to bring the Policy 3043 charge against Lacks. That administrator, Barbara Davis, stated that, as she read the Student Discipline Code, it prohibited a student even from reading profanity aloud from a recognized work of literature as part of a classroom assignment. Tr. 1700; *see also* Hrg. Tr. 792. Davis admitted, however, that the Code never had been applied in the context of any classroom assignment prior to Lacks' case. Tr. 1701.

5. The methodology according to which Lacks taught creative writing at Berkeley High School was one that she had employed during her entire career with the District—a methodology that, throughout that time, the District itself had endorsed and recommended to teachers of creative writing both within the District and nationwide. Tr. 345-46, 348, 350. Referred to at trial as the "student-centered" method, and originally developed in the 1960's by noted educator James Moffett, this method's central tenets, as summarized in guidelines *distributed to teachers by the District*, are as follows:

> Don't tell writers what should be in their [creative] writing or worse, write on their pieces. Build on what writers know and have done, rather than be-

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[6] [Continued]

> Q. Well, how is a student including a piece of street language or profanity in creative writing, do you think, how does the Student Discipline Code apply to that?
>
> A. I just don't think it does. We're talking about here an assignment where you're creating characters, and in order to create them, if you need to use the language, the setting, the situations that those characters are in, then you create a script, a play, and that is, I suppose, no different than writing an essay. It's a special kind of an assignment. It's not just the back and forth of kids in the classroom without any assignment attached.

Tr. 1263-65.

Dolores Graham, who served as a principal in the District for more than eleven years and as an assistant principal for longer, gave similar testimony. Tr. 1098-99.

> moaning what's not on the page, what's wrong with what is there. Resist making judgments about the writing.

Tr. 348; Exh. 195, pp. 4-5.

As Lacks explained at trial, this method dictates that the teacher should not attempt to control the content and language of student creative works—particularly students' initial creative efforts—

> [b]ecause from the research and from information even in our own curriculum, students shut down when a teacher starts making judgments about the content. The students simply decide that they are writing then for the teacher, and the whole concept of voice that I talked about before just totally disappears. Students think they have no voice.

Tr. 351.

Lacks recounted a specific example of how, during the 1992-1993 school year at Berkeley, her use of the student-centered method led one student, Reginald, to progress during the semester from total non-participation in classroom activities, to initial efforts at poetry that were highly disjointed and laden with profanity, to composing accomplished poems without profanity, including a poem that won the highest district-wide award for student poetry. Tr. 367.[7]

Expert witness testimony—including testimony from the Executive Director of the National Council for Teachers of English—established that the student-centered method is widely used with success in secondary schools throughout the country, Tr. 1106, 1114-18, and that it is not unusual to see, particularly in first attempts at creative writing, profanity of the kind that appeared in the video-

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[7] Judge McMillian's opinion dissenting from the order denying en banc rehearing in this case sets forth in full three of Reginald's later poems, including the award-winning poem, and quotes extensively from the trial testimony concerning how Lacks' teaching method was successful in improving Reginald's writing and getting him past the use of profanity. App. 23a-33a.

taped student drama exercises written by Lacks' students. Tr. 1181. One expert in student play-writing, when asked about her reaction to the videotape, stated that "[t]here was nothing surprising in that. The language was appropriate for the characters, and this is language that we have seen in classrooms across the country." Tr. 1181.

6. The disciplinary process that led to Lacks' termination was initiated by Principal Vernon Mitchell, who learned of the existence of the videotaped drama exercise in January, 1995, three months after the exercise had taken place. As Mitchell admitted at trial, he saw the drama exercise from the outset of his investigation in racial terms, *viz*, as "black students acting a fool and white folks videotaping it." Tr. 1392. Mitchell testified that he used those words when he was telling one of Lacks' African-American students, Everette, what it was that had "offended" Mitchell about the incident. Tr. 1393.[8]

Quite apart from his reaction to the videotape, there was evidence that Mitchell "had displayed signs of hostility to white teachers at Berkeley because Mitchell believed that some white teachers did not care about the students." App. 13a. *See also* Tr. 1492 (testimony from School Board member that there had been "several" complaints from teachers to the effect that Mitchell was prejudiced against white teachers). And, as we have noted, Mitchell did not take any adverse action against Sharita Kyles, the African-American teacher who sponsored the production of "How Ya Livin'," the student-written play that contained profanity and obscene gestures.[9]

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[8] Mitchell used similar racial terminology when speaking about the incident with District Curriculum Coordinator Larilyn Lawrence. Tr. 1269.

[9] The record also reflects that, in the spring of 1994, an African-American substitute teacher, John Mitchell (who, unbeknown to Lacks, was Vernon Mitchell's nephew) showed a Louis Farrakhan videotape to Lacks' class and made anti-semitic remarks directed in part at Lacks, whom Mitchell knew to be Jewish. Tr. 495. In response to an assignment from Lacks to write a journal entry

As the Eighth Circuit stated in the decision below, there was evidence at trial that the District's Assistant Superintendent for Personnel, John Wright, who also was African-American, likewise viewed the videotaping incident in racial terms. App. 13a. It was Wright who conducted an investigation of the taped drama exercises after Mitchell brought the matter to his attention, and Wright drafted the charges against Lacks that were presented to the School Board.

7. Under the Missouri Teacher Tenure Act, Lacks had a right to a pre-termination hearing before the School Board, and she exercised that right by requesting a hearing.

At the beginning of the hearing, the District announced that it was pursuing just one charge of misconduct: that Lacks had willfully violated School District Policy 3043 by failing to enforce the Student Discipline Code to discipline students who used profanity in their creative works.[10] It was undisputed at the hearing, and it has

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relating to the day that the substitute teacher was present, a student wrote a paper which said:

> We read out loud about Louis Farrakhan and how the white people and the Jews tried to persecute them. But Louis wouldn't have it so he told them honkies and them Jews and them chinks that if they mess with his people, he mess with them, and also, Louis Farakhan [sic] believed that all white peoples are devils, and I agree, because all they want to do is use you for their own use. But check this, I ever seen a white or a Jew touch me, I'm going to kill the monkey crackers and them chinks because I hate them all. And another thing, I don't care what Hitler did to you. That was in Russia, and this is the U.S., and they love you all and hate us. Tr. 495.

Upon receiving this piece of writing, Lacks showed it to Mitchell and explained the circumstances under which it had been created. Tr. 496. Despite the profanity and racial hatred conveyed in the piece, Mitchell did not suggest that either the student or the substitute teacher be disciplined, Tr. 498, 501, nor in fact were they.

[10] The District's case was focused on the videotaped drama exercises, but the District also contended that Reginald's initial poems, *see supra* at 9, written in the 1992-1993 school year, constituted

remained undisputed, that, under Missouri law, for a school district to terminate a tenured teacher on such a ground, it is necessary for the district to establish a "willful" violation of a written regulation, which, in the case of Lacks, meant that the District had to prove "that Lacks violated the board policy prohibiting profanity, *and that she knew that the board policy applied to the profanity used by her students.*" App. 6a (emphasis added).

At the Board hearing, as at trial, Lacks testified that she did not believe that the Student Discipline Code applied to profanity in student creative works, that no one had ever suggested to her that the Code was applicable in that context, and that she had never heard of any instance in which any student had been disciplined for using profanity in that context, let alone any teacher for allowing it. Hrg. Tr. 484, 630-31. And, as at trial, Lacks called to the stand teachers and administrators who testified that they likewise had not understood it to be a violation of any policy for a teacher to permit students to use profanity in their creative writing. Hrg. Tr. 813, 823, 845; *see also* App. 44a-47a. Lacks also introduced evidence regarding Principal Mitchell's disparate treatment of her and Sharita Kyles, Hrg. Tr. 212, 215, and Mitchell's statement that what offended him about the videotape of Lacks' students was that it was "black students acting a fool and white folks videotaping it." Hrg. Tr. 221.

In its written decision terminating Lacks, the only evidence cited by the Board in support of its finding that Lacks' violation was "willful" was Mitchell's testimony regarding warnings he claimed to have given Lacks in her capacity as faculty sponsor of the school newspaper, concerning the use of profanity in the paper. Exh. 217. Mitchell's testimony on this subject was impeached in the Board hearing and was thoroughly discredited at trial.[11]

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violations of the Student Discipline Code, and that Lacks should have disciplined Reginald for writing those poems.

[11] In the Board hearing, Mitchell testified that he had warned Lacks about the use of certain words in the newspaper; yet the

But in any event, Mitchell did not even *contend* that he had told Lacks that students' use of profanity in the newspaper—or in other written work—would constitute a violation of the *Student Discipline Code*.[12]

Although, as noted, Lacks raised the issue of Mitchell's racial bias at the hearing, the Board members "never discussed any alleged racial discrimination" in their deliberations. App. 14a.

C. Proceedings in the Eighth Circuit

1. *The Panel Opinion*

a. *The First Amendment Notice Claim*

The jury answered "no" to the question whether Lacks had "reasonable notice that allowing students to use profanity in their creative writing was prohibited." App. 9a. The Eighth Circuit, however, held that the jury was required to answer "yes." In so holding, the Eighth Circuit specifically acknowledged that the jury was free to disbelieve Mitchell's testimony that he had warned Lacks

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newspapers were introduced into evidence, and they did not contain any of the words Mitchell cited. *See* Hrg. Exh. 14. Mitchell's memoranda to Lacks concerning the newspaper also were in evidence at the Board hearing, and they made no mention of any concern about profanity. *See* Hrg. Exhs. 36, 37. At trial, Mitchell was forced to admit that his testimony before the Board about the newspapers was inaccurate. Tr. 1363.

[12] The District had a *separate* policy, applicable *only to the newspaper*, which broadly required the newspaper's faculty advisors to "monitor style, grammar, format, and appropriateness of materials," and to "edit material considered obscene [or] libelous." Exh. 96; 46a-47a n.1. If what Mitchell claimed to have told Lacks —*viz.*, that it was "inappropriate" for the student newspaper to include "profanity . . ., negative reflections on teachers, things like that," Hrg. Tr. 174—could be understood as a reference to any particular policy of the District, that policy was the one applicable to the editing of the student newspaper, *not* the Student Discipline Code. *See* Hrg. Tr. 184-85 (testimony of Vernon Mitchell) (what Mitchell "mentioned about the paper [was] not only the profanity but just the inappropriateness of the materials"); Hrg. Tr. 174, 175, 178, 179, 182, 190-91, 240.

about profanity that he claimed had appeared in the school newspaper. App. 11a. Notwithstanding that—and notwithstanding the evidence canvassed above showing that, prior to Lacks' case, the Student Discipline Code had been understood by teachers and District administrators as having no application to student creative works—the court of appeals held "as a matter of law" that, because the language of the Student Discipline Code "contains no exception for creative activities," App. 10a, Lacks "took the risk that the board would enforce the policy as written." App. 11a.

b. *The Title VII Claim*

The Eighth Circuit also overturned the jury's verdict in favor of Lacks on her Title VII claim. In so doing, the court acknowledged that the jury properly could have concluded that Principal Mitchell and Assistant Superintendent Wright were motivated by race in pressing charges against Lacks. App. 13a. And the court acknowledged that the jury properly could have found that Mitchell was lying when he testified to the Board that he had warned Lacks about profanity in the school newspaper. App. 11a. That testimony, as the court further acknowledged, was explicitly relied upon by the Board in finding that Lacks acted with the "willfulness" necessary to sustain the termination of a tenured teacher for misconduct under Missouri law. App. 8a. Indeed, it was undisputed that the Board relied on no evidence other than Mitchell's testimony to establish that point.

But the Eighth Circuit held that the jury's verdict that Lacks was terminated because of her race could not stand, because "Mitchell and Wright did not make the decision to terminate Lacks; that decision was made by the school board." App. 13a. The court found it dispositive that neither Mitchell nor Wright made any specific "recommenda[tion]" in the Board hearing, and "the board made an independent determination as to whether Lacks should be terminated and did not serve merely as a conduit for the desires of school administrators." App. 13a-14a.

2. *The Dissent From the Denial of Rehearing En Banc*

Judge McMillian and Judge Morris Sheppard Arnold dissented from the Eighth Circuit's denial of rehearing en banc. In Judge McMillian's opinion in support of en banc rehearing, he reasoned that the Student Discipline Code "was not explicit with respect to [prohibiting profanity in] classroom creative assignments," and that, "in light of evidence that profanity in other student creative works—including one student-written play—was apparently condoned," it could not fairly be concluded as a matter of law that Lacks was on reasonable notice that "the profanity prohibition applied to creative writing assignments." App. 22a. As Judge McMillian saw it, upholding the termination of Lacks based on invocation of the Student Discipline Code in these circumstances implicated "issues of exceptional importance," App. 16a, because a legal regime that would permit a teacher to be fired for transgressing a policy that she justifiably "never even knew was there" would threaten to chill all teaching that might prove controversial, and would thereby threaten to "scare[] away" "all innovative and well-meaning teachers." App. 34a, 36a.

Judge McMillian emphasized that he would have "no quarrel with a school policy that clearly and strictly prohibits students from using profanity in all school-related activities," including creative writing, but he concluded that the District here did not have such a policy, and therefore Lacks was, in essence, terminated because she did not "pick [her] way through a mine field of competing and conflicting expectations, and changing and elusive legal standards." App. 35a.

REASONS FOR GRANTING THE WRIT

This case raises two recurring issues of exceptional importance as to which this Court has not spoken and as to which the courts of appeal have issued inconsistent, and in some instances directly contradictory, decisions. The first question involves the nature and scope of the First Amendment doctrine that requires reasonable notice

before the government may punish a person—particularly a public school teacher—for her speech. The second question is that of employer liability under Title VII for an employment decision made by high level managers who are not themselves motivated by racial animus, but whose decision is brought about by the racial animus of other agents of the employer. Both questions, squarely presented in this case, warrant review by this Court.

I. This Case Raises an Important Question That Has Divided the Circuits Concerning the Nature and Scope of the First Amendment Requirement That the Government Must Provide Teachers With Reasonable Notice as to What Speech Is Prohibited Before Disciplining Them for Their Expressive Activties.

1. This Court long has held that, " 'because First Amendment freedoms need breathing space to survive,' " the government may not penalize someone from engaging in speech unless it has provided notice sufficient to "clearly inform" the person as to what speech is prohibited. *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963)). In *Keyishian*, the Court held that this requirement of fair notice must be enforced with particular vigilance in cases involving the discipline of teachers, because

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.
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> * * * *
>
> When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone . . . ." *Speiser v. Randall*, 357 U.S. 513, 526 [(1958)]. For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *N.A.A.C.P. v. Button, supra*, at 433. The danger of that chilling

> effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

385 U.S. at 603-04.

Although *Keyishian* involved the rights of faculty members of public colleges, subsequent decisions have held that the requirement of clear notice applies equally to disciplinary actions taken against high school teachers for expressive activities. Shortly after *Keyishian* was decided, the First Circuit held in a pair of cases that the notice requirement is essential in both settings. *See Keefe v. Geanakos*, 418 F.2d 359, 362-63 (1st Cir. 1969); *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971), *aff'g* 323 F. Supp. 1387, 1392 (D. Mass.) (Wyzanski, J.). More recently, the First Circuit reaffirmed its holdings on this subject in *Ward v. Hickey*, 996 F.2d 448, 453-54 (1st Cir. 1993). And other courts as well have held that the notice requirement applies in the high school setting. *See, e.g., Stachura v. Truzskowski*, 763 F.2d 211, 215 (6th Cir. 1985), *rev'd and remanded on other issues sub nom. Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986).

2. The Eighth Circuit purported to apply the notice requirement in this case, App. 10a, but the court in fact cut the heart out of the doctrine, and adopted an approach directly at odds with that of other circuits, by treating the notice inquiry as an abstract exercise in linguistics that can be performed by examining a particular regulation in a vacuum.

As we have noted, the jury specifically found that Lacks did *not* have "reasonable notice that allowing students to use profanity in their creative writing was prohibited." The jury reached that result on a record that is replete with evidence that District administrators had regularly tolerated, and even applauded, student works that contained profanity, and that neither teachers nor administrators had understood the Student Discipline Code as applying to students' creative writing. *See supra* at 5-8.

The court of appeals did not deny that the record contained such evidence; and the court acknowledged that the jury was free to discredit the only testimony that, if believed, might tend to establish that Lacks was on notice that profanity was prohibited in student writing—the testimony of Principal Mitchell concerning alleged use of profanity in the student newspaper. App. 11a. But the court dismissed all of the evidence of how the District's policy had in fact been understood and applied, saying:

> Even so, the policy against profanity was explicit. . . . In acting as [Lacks] did, she took the risk that the board would enforce the policy as written.

App. 11a.[13] The Eighth Circuit thus held that, "as a matter of law," App. 9a, the First Amendment notice requirement is satisfied as long as a written policy can linguistically be construed to prohibit the expressive activity at issue, no matter how strong the evidence may be that the individual who has been punished could not reasonably have understood the policy to be applicable.

This holding creates a square conflict with the First Circuit's decisions regarding the notice doctrine. In *Keefe*, for example, a school district sought to terminate a teacher for assigning to a class of high school students a magazine article containing the word "motherfucker" and for leading a classroom discussion in which the teacher said the word aloud. The school district claimed that the teacher was on notice that his conduct was prohibited because there was a regulation in place that provided that "[t]eachers shall use all possible care in safeguarding the health and moral welfare of their pupils, discountenancing promptly and emphatically: vandalism, falsehood, profanity, cruelty, or other form of vice." 418 F.2d at 362 n.10. The First Circuit determined nevertheless that the teacher was *not* on reasonable notice, because profanity had been tolerated in other educational

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13 *See also* App. 10a ("The Student Discipline Code clearly prohibits profanity and obscene gestures, and it contains no exception for creative activites.")

contexts at the school and because the regulation did not appear to be "apposite" to the conduct at issue. *Id.* at 362.

Thus, as the First Circuit recently reaffirmed in *Ward*, that Circuit takes the view that "t[h]e relevant inquiry is: based on existing regulations, policies, discussions, and *other forms of communication between school administration and teachers*, was it reasonable for the school *to expect the teacher to know* that her conduct was prohibited?" 996 F.2d at 454 (emphasis added).

The Eighth Circuit's decision here also is in conflict with the decision of the Ninth Circuit in *Cohen v. San Benardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1290 (1997). There, the court held that it was impermissible under the First Amendment for officials of a public college to apply a "[p]olicy's nebulous outer reaches to punish teaching methods that [the teacher] had used for many years," when those methods "had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the College" prior to the adverse employment act at issue. *Id.* at 972. In reaching that conclusion, the Ninth Circuit did *not* suggest that the college's policy was *by its terms* inapplicable to the teacher's speech.

Cases in other contexts besides public education also have rejected the Eighth Circuit's notion that, where First Amendment activity is at issue, a person must "t[ake] the risk that the [government] would enforce [a] policy as written," App. 11a, regardless of the circumstances that would lead a reasonable person to think that the policy would not be so applied. Indeed, the approach taken by the court below has been rejected even in the *prison* context, where the notice doctrine is most circumscribed. Thus, in *Wolfel v. Morris*, 972 F.2d 712 (6th Cir. 1992), the Sixth Circuit held that, although a prison regulation required inmates to obtain prior approval from the warden before commencing any "group organizing activity," prison officials transgressed the notice require-

ment when they disciplined inmates who had circulated a petition without obtaining such approval, because, at the prison in question, "inmates . . . ha[d] been allowed to circulate numerous petitions over the years while the relevant regulations were in force" without obtaining prior approval, and the plaintiffs therefore "had no reason to believe that they were engaging in activity prohibited by prison regulations when they circulated the petitions." *Id.* at 717.

The Fifth Circuit likewise has held that actual enforcement practices under a government regulation or policy must be considered in determining whether an individual was on reasonable notice that her expressive activities might be found to constitute a violation, even where the terms of the regulation or policy might appear to prohibit those activities:

> Over time—indeed, probably fairly quickly—certain patterns of enforcement and tacit understandings will develop. This "less formalized custom and usage," *Parker v. Levy*, 417 U.S. 733, 754 (1974), will clarify much of the inevitable imprecision. Supreme Court decisions strongly suggest that the authorities will not be permitted to prosecute conduct permitted by those understandings, *see, e.g., id.; Cox v. Louisiana (II)*, 379 U.S. 559, 568-73 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959), *even if it is apparently proscribed by the ordinance itself*. "Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text." *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940).

International Society for Krishna Consciousness v. Eaves, 601 F.2d 809, 831 (5th Cir. 1979) (emphasis added).

3. The essential fallacy that underlies the Eighth Circuit's contrary reasoning is the notion that, when a particular regulation or prohibition contains "no exceptions," it naturally should be read to apply to every activity that conceivably could be covered by its literal language. Even putting aside First Amendment concerns—and even

in the absence of evidence regarding the actual application and interpretation of a policy such as was presented in this case—that is *not* always the natural way to read a regulation. As then-judge Breyer explained in *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1261 (1st Cir. 1992):

> Exaggerating to explain our point, we find the Government's interpretation a little like that of, say, a park keeper who tells people that the sign "No Animals in the Park" applies literally and comprehensively, not only to pets, but also to toy animals, [and] insects. . . . If one met such a park keeper, one would find his interpretation so surprisingly broad that one simply would not know what he really meant or what to do.

In the present case, a teacher reading a Disciplinary Code applicable to student "behavior," and covering such matters as "theft, gambling . . ., littering . . . [and] possession of glass bottles," *see supra* at 5, cannot fairly be expected to assume—in the face of extensive contrary evidence—that classroom creative writing is part of the "behavior" addressed by the Code.

Whatever may be true in other contexts, where the issue of notice arises in the context of *First Amendment activity*, the Eighth Circuit's approach is entirely out of place, and cannot be reconciled with the teaching of *Keyishian* and the holdings of other circuits. The crucial understanding that has guided this Court's recognition of reasonable notice as a *First Amendment* requirement, particularly in the sphere of public education, is the importance of ensuring that individuals not be induced by fear of possible penalties to "steer far wider of the unlawful zone" than the government actually intends or may properly demand. *Keyishian*, 385 U.S. at 604, quoting *Speiser*, 357 U.S. at 526. One circumstance in which that problem comes to the fore is where, as in *Keyishian*, a regulation uses vague terms. But the same problem can arise from "the exhaustiveness of the . . . language [of a

policy if read] literally," *Data Translation*, 984 F.2d at 1261, particularly where the government's actual *enforcement* of the policy suggests a narrower applicability than a literal reading of the policy might permit. If an individual confronted with a vague policy, *or* with a policy that has not been applied literally, is subject to punishment unless he or she acts in accordance with *the most expansive possible reading* of the policy, the result will be the very chilling effect that the First Amendment notice requirement seeks to prevent.

4. The context in which the notice issues arises in this case is both a recurring one and one that provides a particularly cogent illustration of the point just made. The Student Discipline Code involved in this case is a garden-variety code of student conduct such as exists in virtually every school district. *See supra* at 5 (quoting text of the Code). It certainly is *not* the case that every school district that prohibits swearing in the hallways would wish to have its teachers discipline students for any and all use of profanity in their creative works: undoubtedly many districts would agree with the testimony of the Executive Director of the National Council for Teachers of English, Tr. 1106, 1114-18, that such an approach would be educationally unsound. Yet the plain import of the Eighth Circuit's decision is that, in every school district that has a student discipline code, a teacher "t[akes] the risk" of punishment if she does not treat classroom creative writing as subject to the same prohibition of the use of profanity as applies to hallway cursing.

Thus, the Eighth Circuit's ruling on the notice issue conflicts with the decisions of other circuits, and, if not reversed by this Court, is likely to induce teachers across the country to "steer far wider of the unlawful zone" by prohibiting or punishing student speech that, in many instances, school officials would not actually wish to prohibit. Certiorari should be granted to review this ruling.

II. This Case Raises an Important Question That Has Divided the Circuits Concerning Employer Responsibility Under Title VII for Employment Actions Infected by Discrimination on the Part of Supervisors Below the Rank of Final Decisionmaker.

1. It is common in both the public and private sectors for an employer to make certain personnel decisions—including in particular promotions and terminations—through a process in which various agents of the employer play different roles. Often the ultimate decision is made by high ranking managers or supervisors, but the decision is strongly affected by the actions of supervisors at lower levels in initiating charges or recommendations, providing information or evaluations, and otherwise participating in the decisionmaking process. Where the ultimate decisionmakers had no impermissible motive, but supervisors who played a crucial role in the process acted out of racial animus or some other unlawful purpose, the question whether to impose liability on the employing entity gives rise to difficult issues that have commanded this Court's attention under a number of different federal civil rights statutes.

For example, in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Court held that municipalities are not liable under 42 U.S.C. § 1983 for wrongful employment actions taken at the instance of an official who lacks final policymaking authority over such actions, even if the subordinate official's actions are simply rubber-stamped without any substantive review by the final decisionmaker. *See id.* at 128 (plurality opinion); *id.* at 137 (opinion of Brennan, J., concurring on this point). The Court adopted similar principles of employer responsibility under 42 U.S.C. § 1981 in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737-38 (1989).

More recently, in *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998), the Court held that, under Title IX of the Civil Rights Act, a school district is legally responsible for sexual harassment of a student by an

employee only where an official with the authority to institute corrective measures on the employer's behalf knows about the wrongful conduct and acts with "deliberate indifference" to it—a standard the Court noted was consistent with its standard of employer responsibility under § 1983. 118 S. Ct. at 1999.

In *Gebser*, however, the Court was careful to emphasize that Title VII is governed by different principles of employer responsibility, inasmuch as Title VII "explicitly defines 'employer' to include 'any agent' " of an employer for the purpose of its prohibition against acts of employment discrimination undertaken by an "employer." *Id.* at 1996. The Court has not yet addressed under Title VII the question of employer responsibility for decisions that are made by unbiased final decisionmakers but that have been infected in one way or another by the discriminatory animus of supervisors at a lower level.

The Court's recent decisions in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), illustrate that the apparent simplicity of Title VII's statutory employer-responsibility language is not matched by a simplicity of application where the wrongfulness of the behavior in question stems from the dereliction of agents who are not at the top of the employer's hierarchy. But the analysis and holdings in *Ellerth* and *Faragher* are confined to the unique context of sexual harassment, and do not provide clear guidance with respect to the very different questions presented by the numerous cases, such as this one, in which high ranking officers of an entity have taken adverse employment action without any discriminatory intent, but the discriminatory animus of subordinate agents has affected the decisionmaking process—whether because those agents applied racially discriminatory standards in determining whether to initiate investigations of possible employee misconduct in the first instance, *see, e.g., Simpson v. Diversitech*, 945 F.2d 156 (6th Cir. 1991); or because they presented false or dis-

torted accounts of the employee's conduct or performance to the final decisionmaker, *see, e.g., Griffin v. Washington Convention Center,* 142 F.3d 1308 (D.C. Cir. 1998); *Gusman v. Unisys Corp.,* 986 F.2d 1146 (7th Cir. 1993); *Roebuck v. Drexel University,* 852 F.2d 715 (3rd Cir. 1988); or because they distorted the decisionmaking process in some other racially-motivated manner.

2. In the absence of guidance from this Court, the decisions of the courts of appeal in this area have been inconsistent in their results and unclear as to their underlying rationales.

Many courts have simply assumed that if a supervisor's animus plays any causative role in an employee's termination, the employer is liable for the consequences of the termination, notwithstanding the innocence or good faith of the employer's final decisionmakers. For example, in *Simpson v. Diversitech, supra,* an African-American employee was discharged after having committed three separate disciplinary offenses. The investigation of the second of those three offenses was initiated out of racial animosity by a supervisor, but that supervisor played no role either in the final decision to discipline the employee for that particular offense or in the later decision to terminate the employee for the combined effect of having committed three offenses. Even though those decisions were all made by high-level managers who made an "independent assessment and judgment" of the facts giving rise to the charges of misconduct, the Sixth Circuit found the employer liable for the employee's discharge because, but for the supervisor's animus, the employee would not have been reported for the second offense and would not have been terminated as a result of the third offense. 945 F.2d at 159.

Judge Cornelia Kennedy dissented from the Sixth Circuit's decision in *Simpson,* rejecting the proposition that liability flows to the employer under Title VII whenever a supervisor's discriminatory motive is the "but for" cause of an adverse employment action. *Id.* at 162. According

to Judge Kennedy, liability should attach to an employer under Title VII only when the persons who actually made the termination decision acted out of a discriminatory motive. *Id.* at 163.

The District of Columbia Circuit's recent decision in *Griffin* is to the same effect as *Simpson*. In *Griffin*, the final decisionmaker consulted with several of her subordinates in addition to the biased supervisor, and with the employee's union representative as well, before deciding to fire the employee. The court of appeals held that, even though the final decisionmaker did not accord automatic deference to the supervisor—indeed, the decisionmaker had *rejected* an earlier recommendation by the supervisor that the employee be terminated—the employer nevertheless was not entitled to judgment as a matter of law, because the biased supervisor was the decisionmaker's "chief source of information" about the employee. 142 F.3d at 1311.

The Third Circuit's decision in *Roebuck* goes even farther in finding employer responsibility. Under the multi-level tenure review process followed by the defendant university in that case, "each successive evaluator performed a *de novo* review of [the] candidacy," yet the court held that the finder of fact was entitled to conclude that the university's decision to deny tenure to the plaintiff was tainted by discrimination at a low level in the process, because each evaluator "*considered* the reports and recommendations of each previous evaluator." 852 F.2d at 727.

3. In sharp contrast to the decisions of other circuits, the court below held that the School District was insulated from liability for any racially motivated actions taken by Principal Mitchell or by Assistant Superintendent Wright in connection with the decisionmaking process that resulted in Lacks' termination, because the Board did not itself act out of racial animus, and the Board did not "defer" to any "recommendation" made by Mitchell or Wright. App. 13a-14a. The court found it conclusive that "the school board never discussed any racial discrim-

ination against Lacks by school administrators," and that "the board made an independent determination as to whether Lacks should be terminated." App. 14a.

In reaching this result, the Eighth Circuit did not purport to determine that the jury lacked sufficient evidence for its specific findings that Lacks *would not have been terminated but for her race. See supra* at 3 (quoting the special interrogatories answered by the jury on this point). As we have noted, Lacks could not be terminated unless the Board found that she "willfully" violated District policy; Mitchell's testimony was the sole evidence on which the Board relied in finding willfulness; Mitchell's testimony was false; and there was evidence from which the jury could find that Mitchell was racially motivated. The jury therefore properly could have found that, but for the racially-motivated false accusations of Principal Mitchell, the Board would not have found Lacks to have engaged in any willful violation, and would not have terminated her. The jury also properly could have found that, but for the racial animus of Mitchell and Wright, who conducted the investigation into Lacks' conduct and drafted the charges against her, charges never would have been brought to the Board in the first place.

The decision below does not purport to conclude that the jury could not properly have made such findings on this record. Rather, the Eighth Circuit's holding is that, as a matter of law, the District cannot be held liable in this case because *the Board itself* was not biased, and Mitchell and Wright did not make a formal recommendation that was rubber-stamped by the Board. App. 13a-14a. Under *Praprotnik* and *Jett*, that rationale would be defensible if this case were brought under §§ 1983 or 1981. But the decision below offers no explanation as to how Title VII's very different statutory language admits of the approach the court here adopted.

In explaining its decision, the court cited *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), in which, after ruling in favor of the *plaintiff* on the ground that a final

decisionmaker's lack of a discriminatory animus is *not* sufficient to insulate an employer from liability under the Age Discrimination in Employment Act where the decisionmaker's review of the statements of a biased supervisor is "perfunctory," *id.* at 405, the Seventh Circuit went on to suggest in dicta that an employer should be insulated from liability if its decision to terminate the employee is 'independent," *id.* at 406. The *Shager* court did not elaborate on what qualifies as an "independent" decision for this purpose, except to say that blind deference, in the form of a "rubber stamp" review process, does *not* qualify. *Id.* Judge Posner's opinion in *Shager* is the only court of appeals decision besides this one to suggest possible limiting principles for employer liability in a case of this nature; but, like the decision below, *Shager* neither articulated a clear standard of employer liabilty nor explained how the standard applied was derived.

Whether or not the decision below is consistent with *Shager*,[14] it clearly is in conflict with the decisions of the

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[14] In *Shager*, the court reversed a grant of summary judgment in favor of the employer on the basis that a reasonable jury could find the following: that the employee's supervisor was biased against older workers; that the supervisor submited a report to the employer's final decisionmaking committee in which he portrayed the employee's performance in the "worst possible light"; that the supervisor's account of the employee's performance in the report was facially "plausible"; and that the committee "*was not conversant with* the possible age animus that may have motivated" the supervisor's report. *Id.* at 405 (emphasis added). The phrase in italics appears to presuppose that a properly functioning decisionmaking body "conversant" with the evidence of a supervisor's animus must, at a bare minimum, explore the possible effect of that animus on the credibility of the supervisor's representations regarding the employee before accepting the supervisor's version of disputed events as true.

That did not happen in this case. Here, as the court below stated, the evidence showed that the Board "never discussed any alleged racial discrimination" in its deliberations. App. 14a. That fact, far from *relieving* the employer of liability under the rationale of *Shager* as the court below appeared to believe, *id.*, instead more firmly suggests a *basis* for liability under that rationale.

Third, Sixth, and District of Columbia Circuits in *Roebuck, Simpson, and Griffin, supra.* In *Roebuck* and *Griffin,* reliance by the final decisionmaker on facts filtered through a biased subordinate was held sufficient to give rise to employer liability, *see supra* at 26; and in *Simpson,* the sole fact that the supervisor *initiated the charges* out of racial animosity was deemed sufficient to render the employer liable, *see supra* at 25. Here, Principal Mitchell gave crucial false testimony on which the Board relied; and both Mitchell and Assistant Superintendent Wright were responsible for initiating the charges against Lacks and moving them forward. Thus, the conflict between the decision in this case and *Roebuck, Simpson,* and *Griffin* could not be clearer.

4. Not only do the circuit court decisions on the question presented here reach inconsistent results, but the opinions that the courts have rendered in this area of the law are sketchy and conclusory in their discussions of the employer responsibility issue, with the result that no comprehensive framework of analysis has emerged that can aid the decision of future cases. In that regard, the decision below is typical: the court reached its conclusion without any discussion of how its view of the law could be derived from the language and purposes of Title VII or from any principles of agency law.

This lack of a comprehensible analytic framework can only be expected to compound the existing confusion in the law, leaving employers and employees uncertain as to their responsibilities and their rights under Title VII, and resulting in decisions that cannot be reconciled in any principled way.[15] In some cases, like *Roebuck, Simpson*

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[15] Indeed, in the short time since the Eighth Circuit rendered its decision in this case, the confusion in the law has been further compounded by that court's 2-1 decision in *Kramer v. Logan County School District No. R-1,* 157 F.3d 620 (8th Cir. 1998), where the court *upheld* a Title VII jury verdict against the employer school district, even though the employee had a full hearing before an unbiased school board before she was terminated. The dissenting

and *Griffin*, the employer will be held liable even though the ultimate decisionmaker acted without racial animus and made an independent judgment; in other cases, like this one, an employee who would not have been terminated but for the racially motivated actions of an agent of the employer will be left without redress. Certiorari should be granted so that this Court can clarify the law on this important and recurring question.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to decide both questions presented in this Petition.

Judge in *Kramer*, who sat on the panel in the case *sub judice*, found the two cases to be indistinguishable. *Id.* at 629 ("Our recent precedent in *Lacks* demands that we set aside the jury's verdict.") The majority opinion by Judge Limbaugh, on the other hand, did not even cite the decision in this case. Judge Richard Arnold, who wrote the opinion below, penned a separate concurring opinion in *Kramer* for himself only, in which he purported to reconcile *Kramer* and *Lacks* on the basis that, in his view, "[t]he evidence of bias on the part of the administrators in *Lacks* was very weak, and the misconduct of the teacher (or what the board regarded as misconduct) was egregious." *Id.* at 627.

Judge Arnold's effort in *Kramer* to explain the result in this case only adds to the confusion in the law. *No* court of appeals has suggested that, where there is sufficient evidence of bias on the part of a supervisor to create a jury question—and the court's opinion below is predicated on the acknowledgement that there *was* such evidence with regard to Mitchell and Wright—the reviewing court's perception of the strength of that evidence somehow becomes a factor in determining whether the employer may be held liable for the supervisor's act. Nor has any court found the perceived "egregiousness" of the employee's alleged misconduct to be a relevant—much less a dispositive—factor in that regard. If the decision below were read with the gloss subsequently placed on it by Judge Arnold in *Kramer*, the lower-court law would only devolve into an even greater state of disarray.

Respectfully submitted,

JEREMIAH A. COLLINS *
LEON DAYAN
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
* Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1859EM

CECILIA LACKS,

Appellee,

v.

FERGUSON REORGANIZED SCHOOL DISTRICT R-2,

Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: January 12, 1998

Filed: June 22, 1998

Before RICHARD S. ARNOLD,[1] Chief Judge, WOLLMAN and HANSEN, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

In this case Ferguson-Florissant Reorganized School District ("the school board") appeals the District Court's grant of summary judgment in favor of the plaintiff, Cecilia Lacks, on Lacks's claim under Missouri law that her termination by the board was not supported by sub-

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[1] The Hon. Richard S. Arnold stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on April 17, 1998. He has been succeeded by the Hon. Pasco M. Bowman II.

stantial evidence. The school board also appeals a jury verdict in favor of Lacks on First Amendment and race discrimination claims. We reverse and remand for the entry of judgment in favor of the defendant school district. We hold, among other things, that a school district does not violate the First Amendment when it disciplines a teacher for allowing students to use profanity repetitiously and egregiously in their written work.

I.

Cecilia Lacks began teaching at Berkeley Senior High School in the fall of 1992 after teaching at other schools in the same school district since 1972. Lacks taught English and journalism classes, and she sponsored the school newspaper. In October 1994, Lacks divided her junior English class into small groups and directed them to write short plays, which were to be performed for the other students in the class and videotaped. The plays written by the students contained profanity, including the repeated uses of the words "fuck," "shit," "ass," "bitch," and "nigger." When the plays were videotaped, these words were used more than 150 times in approximately forty minutes. Hearing Exhibits 12 and 13. Lacks later admitted that the plays contained an unusual amount of profanity, and one of her witnesses later described the use of profanity in the plays as "extreme," "disgusting," "upsetting," and "embarrassing." Hearing Tr. at 271, 277, 439. Lacks was aware of the content of the plays before they were performed, because she had previousy reviewed at least one of the scripts and had attended rehearsals of the plays the day before. Hearing Tr. at 437. On October 10, the students performed their plays and were videotaped at the direction of Lacks. Two other school district employees were also present during the videotaping of the plays: Donna Clark, a part-time teacher, and Mike Minks, an audio-visual technician. Clark and Minks eventually received letters of reprimand from the school administra-

tion for allowing the students to use profanity. Hearing Tr. at 167, 233.

The following January, as a result of complaints by one of Lacks's students, the existence of the videotapes came to the attention of Vernon Mitchell, the principal of Berkeley High School. Mitchell initiated an inquiry into the matter, and he and two school district administrators met with Lacks and her union representative twice over the next two weeks. During the investigation, the administrators learned that as part of a poetry-writing exercise, Lacks had permitted a student to read aloud in a classroom two of his poems which contained profanity and graphic descriptions of oral sex. Hearing Tr. at 386-88, 596-97.

Following the investigation, Dr. Robert Fritz, the district superintendent, formally charged Lacks with "willful or persistent violation of and failure to obey [the school district's] policies" under Mo. Ann. Stat. § 168.114 (1991 & Supp. 1998). Appellant's App. at 901. Fritz alleged that Lacks violated several school board policies and recommended her termination by the school board. Lacks requested a hearing, and the school board heard testimony from Lacks and fifteen other witnesses over five evenings in early March 1995. The school board also examined numerous exhibits and viewed the videotaped performance of the students' plays. At the hearing, the school board narrowed its earlier allegations to one charge: violation of board policy 3043, which requires teachers to enforce the section of the Student Discipline Code which prohibits profanity.[2] On March 23, the board issued a

[2] The Ferguson-Florissant Student Discipline Code prohibits two types of student behavior. Under the Student Discipline Code, Type I behavior includes serious misconduct, such as drug use, theft, or the use of firearms or explosives, which may result in student suspension or expulsion. Type II behavior includes behavior "that is disorderly or unacceptable but does not violate Type I standards . . . ." Under the Code, Type II behavior includes profanity and

decision which found that Lacks was aware of the school board's policy preventing profanity, that she could have chosen teaching methods which prohibited profanity, and that her failuure to do so constituted a "willful and persistent violati[on] of Board policy to a degree that cannot be . . . tolerated." Appellant's App. at 905. Based on its findings, the school board terminated Lacks's teaching contract.

In May 1995, Lacks brought suit in a Missouri state court, seeking judicial review of the school board's decision under Mo. Ann. Stat. § 168.120 (1991 & Supp. 1998). She also alleged that the school board violated her due process rights under the United States and Missouri Constitutions, violated her rights under the First Amendment and 42 U.S.C. § 1983 (1994), and discriminated against her on the basis of race in violation of Missouri law and Title VII of the federal Civil Rights Act. The school board removed the entire case to the District Court pursuant to 28 U.S.C. § 1441 (1994). The District Court granted the school board's motion to dismiss Lacks's due process claims for failure to state a claim upon which relief could be granted, but it denied the school board's motion to dismiss Lacks's First Amendment claim. The District Court also entered partial summary judgment in favor of Lacks on her claim for review of the school board's termination of her teaching contract. See *Lacks v. Ferguson Reorganized School District R-2*, 936 F. Supp. 676 (E.D. Mo. 1996). In its order, the District Court held that Lacks did not willfully violate board policy 3043, because she believed that profanity was permitted in the context of creative expression in the classroom.

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obscene gestures, and a student who engages in Type II behavior is subject to a verbal reprimand, loss of class or school privileges, special work assignments, change of class schedule, or temporary separation from peers. Appellant's App. at 250-51. There are no written exceptions under the Student Discipline Code which permit students to engage in Type II behavior.

Id. at 682-83. Accordingly, the District Court awarded Lacks reinstatement with back pay, attorneys' fees, and costs.

The parties proceeded to trial in November 1996 on Lacks's First Amendment and race discrimination claims. The school board moved for judgment as a matter of law at the close of Lacks's case and its own case, and the District Court denied the motion both times. The District Court submitted the case to the jury, which returned a verdict in favor of Lacks for $500,000 on the First Amendment claim and $250,000 on the race discrimination claim. The school board now appeals.

II.

We can easily dispose of the school board's argument that the District Court improperly allowed the board to remove the case because it lacked jurisdiction to review the school board's decision under the Missouri Administrative Procedure Act. In *City of Chicago v. International College of Surgeons,* 118 S. Ct. 523 (1997), the Supreme Court held that a federal district court properly exercised jurisdiction over a case containing claims for on-the-record review of local administrative findings as well as claims that a local administratitve action violated federal law. *Id.* at 530. The school board recognized in its brief, filed before the Supreme Court decided *City of Chicago v. International College of Surgeons,* that "[t]he case at bar is in a procedural posture identical to the case considered in *International College of Surgeons.*" Appellant's Br. at 15. Accordingly, we hold that the District Court properly allowed the school board to remove this case.

III.

A.

Under Missouri law, when a school board terminates a contract with a teacher under Mo. Ann. Stat. § 168.114,

including termination for the willful or persistent violation of a school board regulation, the teacher may appeal the school board's decision to a state circuit and seek judicial review of the school board's decision. The court must affirm the decision of the school board unless the decision (1) violates a constitutional provision; (2) is made in excess of statutory authority or jurisdiction; (3) is unsupported by "competent and substantial evidence upon the whole record"; (4) is made for any other reason unauthorized by law; (5) is made upon unlawful procedure or without a fair trial; (6) is arbitrary, capricious or unreasonable; or (7) involves an abuse of discretion. Mo. Ann. Stat. § 536.140 (1988 & Supp. 1998). This scope of review is limited. The reviewing court must affirm the school board if the board "reasonably could have reached the decision it did." *Hudson v. Wellston School District*, 796 S.W.2d 31, 33 (Mo. App. 1990). The court may not substitute its judgment of the evidence for that of the school board, and it must consider all evidence in the light most favorable to the decision of the board. *Id.* The determination of the credibility of the witnesses is a function of the school board, not the reviewing court. *Ortbals v. Special School District,* 762 S.W.2d 437, 439-40 (Mo. App. 1988) (citations omitted).

The District Court granted summary judgment in favor of Lacks because it found insufficient evidence in the record that Lacks "willfully or persistently" violated board policy 3043. *Lacks,* 936 F. Supp. at 680. The parties agree with the District Court that proof of "willful or persistent" violation is twofold: The school board must prove both an intent to act and an intent to violate or disobey a particular regulation. *Lacks,* 936 F. Supp. at 680 (citing *Ortbals,* 762 S.W.2d at 440). In other words, in order to prevail the school board must prove that Lacks violated the board policy prohibiting profanity, and that she knew that the board policy applied to the profanity used by her students. After a careful review of the

evidence, we hold that the record contains sufficient evidence for the school board to have concluded that Lacks willfully violated board policy.

Lacks admitted that she allowed students to use profanity in the classroom in the context of performing the plays they had written and reading aloud the poems they had composed. Hearing Tr. at 386-88. At the hearing, and in her brief, Lacks defended this practice by arguing that she thought that the board's policy on profanity applied only to "student behavior" and not to students' creative assignments. *Id.* at 484-86. She also argued that her teaching method, which she describes as the "student-centered method" and which she explained at length at the hearing, required her to allow her students creative freedom, which included the use of profanity. *Id.* at 372-78. Lacks could not say with certainty that she would be able to teach at Berkely High School if her students were not given the freedom to use profanity in their creative activities. *Id.* at 560-64. As evidence that Lacks believed that the anti-profanity policy did not apply to students' creative assignments, the District Court noted that testimony at the hearing indicated some confusion within the school district as to whether reading aloud literature which contained profanity might violate the school board's prohibition on profanity. *Lacks*, 936 F. Supp, 682. For example, Larilyn Lawrence, a curriculum coordinator for language arts at the school district, believed that a videotaped production of a play with students using profanity could fall within acceptable course parameters. Hearing Tr. at 840-43. On the other hand, Barbara Davis, the assistant superintendent for curriculum instruction, testified that teachers in the school district should not allow students to read aloud profanity contained in literary works. *Id.* at 792.

The school board also heard testimony from Lacks's principal, Vernon Mitchell, that he told Lacks that profanity was not permitted in the school newspaper. Mitchell

testified that he specifically spoke to Lacks in 1993 about profanity in the school newspaper, and told her that use of profanity in the newspaper was not allowed. Hearing Tr. at 172-73, 240. Mitchell said that he had reviewed a draft of the newspaper and was concerned that the students were including profanity in the paper by writing "S blank blank T" and "F blank blank K" rather than writing every letter of the profane words. *Id.* at 173, 234, 249. Mitchell testified that he discussed the use of profanity in the newspaper with Lacks "[t]wo or three times." *Id.* at 240. Mitchell also noted that signs posted in Lacks's classroom read "No Profanity." *Id.* at 250. When the board issued its opinion terminating Lack's contract, it based its decision in part on its finding that Lacks had been warned about the use of profanity by Mitchell. Appellants' App. at 904.

Lacks claimed that Mitchell never warned her about the use of profanity in the newspaper. Hearing Tr. at 413. However, under Missouri law, assessing the credibility of witnesses is the function of the school board, not the reviewing court. See *Ortbals*, 762 S.W.2d at 439-40. Because the school board heard testimony that Lacks was directly warned by the principal in her school that including "S blank blank T" and "F blank blank K" in the student newspaper violated the school board's profanity policy, the board could have reasonably found that Lacks knew that profanity was not allowed in students' creative activities. While Lacks did produce some evidence that confusion existed in the school district as to the profanity policy, and while she denied that she had been warned about it, we must read the record in the light most favorable to the school board's decision, together with all reasonable inferences. *Hudson v. Wellston School District*, 796 S.W.2d at 33.

The policy prohibiting profanity was explicit and contained no exceptions. It was not ambiguous. The board

was free to find that Mitchell gave Lacks an express and particularized direction about the student newspaper. We think it was not unreasonable for the board to treat student writing for the newspaper and student writing for the class as alike. Isolated instances of profanity had been overlooked or tolerated in the past, but what went on in Lacks' classroom went far beyond the reading aloud of a novel containing the occasional "damn." The board might have chosen a lesser form of discipline, especially in view of Lacks's long and devoted service. It was not required to do so by law. We hold that the board's decision was reasonable and supported by substantial evidence on the record as a whole. The judgment in the plaintiff's favor on this claim must be reversed.

B.

When the jury returned a verdict in favor of Lacks on her First Amendment claim, it provided answers to two interrogatories posed by the District Court's instructions. Under the District Court's instructions, answering "no" to either of the interrogatories allowed Lacks to prevail on the First Amendment claim. With respect to the first interrogatory—"Did [Lacks] have reasonable notice that allowing students to use profanity in their creative writing was prohibited?"—the jury answered "no." With respect to the second interrogatory—"Did defendant school district have a legitimate academic interest in prohibiting profanity by students in their creative writing, regardless of any other competing interests?"—the jury also answered "no." Appellant's App. at 341. The District Court subsequently entered judgment in favor of Lacks with respect to her First Amendment claim. We reverse and hold, as a matter of law, that the answer to both of those questions was "yes."

Lacks argued at trial and on appeal that she was acting as a facilitator for her students' speech, and that, under First Amendment law, she cannot be punished for not prohibiting her students' use of profanity unless she was

provided with reasonable notice that profanity was prohibited in students' creative exercises, and unless the prohibition on profanity in creative activity served a legitimate academic interest. At least one court has held that, under the First Amendment, a school district must provide a teacher with notice as to what types of expression are prohibited in a classroom before it holds the teacher responsible for failing to limit that type of expression. See *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (citing *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)). We are satisfied that Lacks was provided with enough notice by the school board that profanity was not to be allowed in her classroom, whether in the context of a creative exercise or not. Lacks testified at trial that she understood that, under her contract with the school district, she was required to enforce the Student Discipline Code, and she testified that she was familiar with the rules and policies of the school board. Trial Tr. at 562-63. The Student Discipline Code clearly prohibits profanity and obscene gestures, and it contains no exception for creative activities. Appellant's App. at 251. Moreover, Lacks's principal, Vernon Mitchell, testified at trial, as he did at the school board hearing, that he informed Lacks that the use of profanity by the students was not permitted in the student newspaper, one form of creative activity. Mitchell told Lacks: "There is no way I would allow profanity in the newspaper." Trial Tr. at 1412.

In fact, Lacks received more notice than has been required in other cases. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), a student was disciplined for using sexually suggestive language in a speech before a high school assembly. Before the student gave the speech, he told some of his teachers what he was going to say, and he was told that the speech was "inappropriate and that he probably should not deliver it" and that giving the speech could have "severe consequences." *Id.* at 678. The Court rejected the student's argument that his due process rights had been violated

because he had not received sufficient notice that a delivery of the speech would result in discipline: "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disuptive of the educational process, the school discriplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Id.* at 686. In the present case, not only did Lacks admit that she was familiar with the school district's disciplinary rules and understood her obligation to enforce them, her principal also testified that he told her that the rules applied to one form of student creative activity. Therefore, as a matter of law, Lacks had sufficient notice that under the board's rules, she was not to permit profanity in her clasroom. Perhaps the jury did not believe the principal's testimony about the warning he gave Lacks. Even so, the policy against profanity was explicit. Lacks well knew what the plays were like before she allowed the students to perform them. In acting as she did, she took the risk that the board would enforce the policy as written. Under the circumstances, the notice given was fair and constitutionally sufficient.

We also hold, as a matter of law, that the school board had a legitimate academic interest in prohibiting profanity by students in their creative writing. The Supreme Court has written that public education " 'must inculcate the habits and manner of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.' " *Fraser,* 478 U.S. at 681 (quoting C. Beard & M. Beard, *New Basic History of the United States,* 228 (1968)). While students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969), students' First Amendment rights "in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Fraser,* 478 U.S. at 681. Accord-

ingly, the Supreme Court has held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 273 (1988).

A flat prohibition on profanity in the clasroom is reasonably related to the legitimate pedagogical concern of promoting generally acceptable social standards. The Supreme Court has told us that "schools must teach by example the shared values of a civilized social order." *Fraser,* 478 U.S. at 683. The school board itself, in its opinion terminating Lacks's employment with the school district, wrote that the purpose of the board's disciplinary policies is "to establish, to foster, and to reflect the norms and standards of the community it serves." Appellant's App. at 903. Allowing one student to call another a "fucking bitch" and a "whore" in front of the rest of the class, and allowing a student to read aloud a poem that describes sexual encounters in the most graphic detail, as the students did in Lacks's classroom, hardly promotes these shared social standards. We consider the matter too plain for argument.

As a matter of law, the school board had the right to establish and require the enforcement of a rule which prohibits classroom profanity in any context, and it provided Lacks with enough notice of its disciplinary policies. Therefore, the judgment in the plaintiff's favor on her First Amendment claim is reversed.

C.

At trial, Lacks set out to prove her race discrimination case by "direct" evidence of discrimination under *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), rather than the indirect, burden-shifting method of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). See Appellee's Br. at 51-52. The jury found that Lacks had proved by a preponderance of the evidence that race was

a motivating factor in the school board's decision to terminate her, and that the school board did not prove by a preponderance of the evidence that it would have discharged Lacks regardless of her race. We reverse, and hold as a matter of law that race was not a motivating factor in the school board's decision to terminate Lacks. In reaching that conclusion, we are mindful that the evidence must be viewed in the light most favorable to the jury's verdict, and that all *reasonable* inferences in support of the verdict must be allowed.

Lacks points to a statement made by Vernon Mitchell, her principal and supervisor. Mitchell admitted that when he saw the videotape with the students performing their plays, his reaction was that it was "black students acting a fool and white folks videotaping it." Trial Tr. at 1392. Lacks also elicited testimony from another teacher at Berkeley High School that in the past Mitchell had displayed signs of hostility toward white teachers at Berkeley because Mitchell believed that some white teachers did not care about the students. *Id.* at 1316. And Lacks produced some evidence which arguably showed that Dr. John Wright, an assistant superintendent for personnel, viewed the videotaping incident in racial terms. *Id.* at 1656. Lacks is white; Mitchell, Wright, and the students are black.

However, Mitchell and Wright did not make the decision to terminate Lacks; that decision was made by the school board. Trial Tr. at 1906-07, 2013. Lacks responds to this problem by arguing that the school board was influenced by the bias of the administrators, and that the board consequently served as the conduit, or "cat's paw," of the racial animus of the school administration. See *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1057-58 (8th Cir. 1993); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). But Lacks produced no evidence that the school board deferred to the opinion or judgment of Mitchell or Wright in making its determination. At the board's hearing, neither Mitchell nor Wright

recommended that the board terminate Lacks. Trial Tr. at 1418, 1907. Patrick Boyle, a school board member, testified that no members of the administration were present during the board's deliberations, and that no administrator suggested to the board what the decision should be. *Id.* at 2013-14. Boyle said that all board members agreed that Lacks had violated school policy, and that most of the deliberations centered on the level of discipline she should receive. *Id.* at 2012. Michael Hirsch, another school board member, testified that during its deliberations, the school board never discussed any alleged racial discrimination against Lacks by school administrators. *Id.* at 1905. Hirsch said, "We sat and we reviewed the evidence; talked about the evidence; how it related to board policy. We listened to the arguments and discussed the arguments on both sides" *Id.* at 1906. The evidence in this case unequivocally shows that the board made an independent determination as to whether Lacks should be terminated and did not serve merely as a conduit for the desires of school administrators. Lacks's "cat's paw" theory must therefore fail.

Lacks offers one piece of evidence which allegedly shows direct racial bias on the part of the school board: a four-page press release issued by the board after it terminated Lacks's teaching contract. The press release reads in part:

> Teachers set the tone and direction for class assignments and projects, and all classroom activities should be able to stand the test of public scrutiny. The video produced in Ms. Lacks' class demonstrates a serious and extreme lack of direction from the teacher. Teachers do not have the right to abdicate their responsibility to set standards under the guise of creativity. The content of the video is a violation of our black community; it is a violation of our white community; it is a violation of the values within our community and it is a violation of the ethical teaching standards practiced by all educational professionals. Most importantly, it is a viola-

> tion of the students in the class. It assumes that all students in the class operate from the standard of behavior portrayed on the video. That assumption is wrong, and it is what led to the student complaints that brought the video to the administration's attention.

Appellant's App. at 1008-09. Lacks argues that the references to "white community" and "black community" provide direct evidence that the board "had race on its mind" when it fired Lacks. Appellee's Br. at 59. That proposition is questionable, especially given that Leslie Hogshead, the president of the school board, who signed the statement, testified that she did not believe the Lacks's case involved racial issues. Trial Tr. at 1496. Moreover, having race on one's mind is not the same thing as acting because of race. At any rate, the single reference in the school board's press release is not sufficient to sustain the jury verdict on the race discrimination claims. Because Lacks has produced insufficient evidence that the school board's decision to terminate her was motivated by race, the judgment in Lacks's favor on her race discrimination claims cannot stand. On this record, the inference that the school board acted because of Lacks's race is wholly unreasonable. In our view, the extreme nature of the language used and the exhaustive hearing given Lacks by the board leave no room for anyone reasonably to conclude that Lacks was disciplined because of her race.

The judgment of the District Court is reversed, and the cause remanded with directions to dismiss the complaint with prejudice.

It is so ordered.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1859EMSL

CECILIA LACKS,

Appellee,

vs.

FERGUSON REORGANIZED SCHOOL DISTRICT R-2,

Appellant.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

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Filed: September 17, 1998

The suggestion for rehearing en banc is denied. Judge MacMillan and Judge Morris Sheppard Arnold would grant the suggestion. The petition for rehearing by the panel is also denied.

McMILLIAN, Circuit Judge, dissenting.

I dissent from the court's denial of the petition for rehearing en banc. I believe that consideration by the full court is necessary to maintain uniformity of our decisions and, more importantly, because this case involves issues of exceptional importance. *See* Fed. R. App. P. 35(a).

This case is not about whether students should or should not be permitted to use profanity in their creative writing

assignments or anywhere else in school; indeed, I have no quarrel with a school policy that clearly and strictly prohibits students from using profanity in all school-related activities. Nor is there any question that Lacks allowed some of her students to use profanity in their creative writing assignments "repetitiously and egregiously," as the panel states. *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719 (8th Cir. 1998) (*Lacks*). The issue in this case, however, concerns the constitutionality of terminating a public high school teacher—one who had been teaching for over twenty years—for allowing students to use profanity in their creative writing assignments, where that teacher was not on notice that the school's profanity policy, as stated in the Student Discipline Code, was meant to cover student creative writing assignments.

The factual question of whether Lacks was notified that the school policy prohibiting profanity covered student creative writing assignments was submitted to the jury in an interrogatory. The interrogatory asked: "Did [Lacks] have reasonable notice that allowing students to use profanity in their creative writing was prohibited?" *Id.* at 723. The jury answered "no." *Id.* That factual finding by the jury must be reviewed by this court under a "highly deferential standard." *Crittenden v. Tri-State Thermo King, Inc.*, 108 F.3d 165, 166 (8th Cir. 1997). More specifically, in reviewing the jury's finding that Lacks did not receive reasonable notice of the applicability of the school policy, this court must "resolve all conflicts in favor of [Lacks], giving [her] the benefit of all reasonable inferences and assuming as true all facts supporting [Lacks] which the evidence tended to prove." *Id.*; *see also Becker v. United States*, 968 F.2d 691, 694 (8th Cir. 1992) ("Our standard for review of a jury finding is a deferential one: we must affirm the jury's verdict 'if, viewing the evidence in the light most favorable to appellees, reasonable persons could differ as to the proper conclusion.' ") (citing *Rademaker v. Nebraska*, 906 F.2d 1309, 1311 (8th Cir. 1990)).

The panel in this case failed to follow our well-established standard of review. The panel reversed the jury's factual finding that Lacks was not given reasonable notice of the applicability of the profanity policy by simply declaring, "as a matter of law," that the answer to the interogatory "was 'yes.'" *Lacks* 147 F.3d at 723. In the interest of maintaining uniformity of our decisions, the panel opinion should be vacated. A jury finding is no less entitled to deference because it leads to an unpopular result. Moreover, the panel opinion's underlying reasoning is flawed for several reasons.

First, the panel opinion cites the fact that Lacks stated at trial that she knew she was required to enforce the Student Discipline Code and that she was familiar with the written rules and policies of the school board. *Id.* Lacks's statement, viewed in isolation, certainly favors the school district's position, but it is only a small portion of Lacks's trial testimony. Lacks was on the witness stand for more than two days during the two-week trial. She provided ample testimony from which it could be inferred that she was not reasonably notified that allowing students to use profanity in their creative writing assignments was prohibited, notwithstanding her knowledge of her duty to enforce the Student Discipline Code and her familiarity with the school board's written rules and policies. The assessment of Lacks's credibility was a function of the jury, not the court of appeals. *See Greaser v. State of Missouri, Dep't of Corrections*, 145 F.3d 979, 983 (8th Cir. 1998) noting that determination of witness credibility is "task for the jury to perform") (citing *Manatt v. Union Pac. R.R. Co.*, 122 F.3d 514, 1518 (8th Cir. 1997) ("it was up to the jury to assess [the witness's] credibility"), *cert. denied*, 118 S. Ct. 697 (1998)).

Lacks also introduced anecdotal evidence at trial which showed that the use of profanity in student creative works had previously been allowed by the school without punish-

ment to the supervising teacher or the students involved. For example, during the trial testimony of school principal Vernon Mitchell, Lack's counsel questioned him about a play entitled "How You Living," which was written and performed by Berkeley High School students under the supervision of a teacher named Sharita Kyles. Mitchell admitted that this play was performed one evening in the school auditorium, that it was open to the community, and that he was in the audience during the performance. Portions of a videotape of that production were shown to the jury during Mitchell's testimony. While watching the videotape, Mitchell conceded that the play had profanity and other inappropriate content. For example, he admitted that there were lines such as: "I tried to keep her back but she was pulling on my thing"; "I'll blow your damn head off"; and "Man, damn leave me the hell alone." In light of these admissions, Lacks's attorney asked Mitchell if he had seen a student play containing profanity before he testified at Lacks's school board hearing. Mitchell answered "yes." He also admitted that when the play was over, he thanked the students and Sharita Kyles for the production and, thereafter, did not take any action against Kyles for violating the Student Discipline Code. Trial transcript (Vol. VII) at 1373-1386.

While the "How You Living" play was performed at Berkeley High School around 1992, shortly before Lacks began teaching there, the evidence certainly supports the conclusion that teachers at the school were not reasonably on notice that they would be punished if a student were to write or perform a play containing profanity. Moreover, while it is abundantly clear that the profanity in Lacks's students' works was worse than the profanity in the play "How You Living," that is not the issue; the issue is whether or not the jury reasonably could have concluded that "[Lacks] [did not] have reasonable notice that allowing students to use profanity in their creative

writing was prohibited," based on the evidence introduced at trial viewed in the light most favorable to Lacks.

The panel opinion also relies on the fact that Mitchell testified at trial that he informed Lacks that the use of profanity by the students was not permitted in the student newspaper, one area of student creative writing. The panel opinion states: "Lacks's principal, Vernon Mitchell, testified at trial, as he did at the school board hearing, that he informed Lacks that the use of profanity by the students was not permitted in the student newspaper, one form of creative activity. Mitchell told Lacks: 'There is no way I would allow profanity in the newspaper.'[1]" *Lacks*, 147 F.3d at 723 (citing Trial transcript at 1412).

Notably, in reversing the district court's summary judgment disposition of Lacks's separate state law claim, which challenged the school board's decision, the panel opined:

> Because the school board heard testimony that Lacks was directly warned by the principal in her school that including "S blank blank T" and "F blank blank K" in the student newspaper violated the school board's profanity policy, the board could have reasonably found that Lacks knew that profanity was not allowed in students' creative activities. While Lacks did produce some evidence that confusion existed in the school district as to the profanity policy, and while she denied that she had been warned about it, we must read the record in the light most favorable to the school board's decision, together with all reasonable inferences.[2]

Id. at 722.

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1 Actually, the quote attributed to Mitchell in the panel opinion is a statement that was made by *Lacks to Mitchell*, not vice versa, during a transcribed meeting that took place on January 25, 1995. *See* Trial transcript (Vol. VII) at 1411-1412.

2 Notably, while the panel opinion omits any mention of the deferential standard of review that the court of appeals was re-

It can equally be said that, while the jury heard testimony that Lacks was directly warned by Mitchell that profanity in the *student newspaper* violated the school board's profanity policy, the jury reasonably could have found that Lacks was not given reasonable notice that profanity in *student creative writing assignments* violated the policy. A school newspaper is not the same as classroom creative writing assignments. Because Mitchell's warning addressed a *publication* which held itself out as a *newspaper* and was identified with the *school as a whole*, the jury reasonably could have concluded that Lacks reasonably assumed that Mitchell's position vis-a-vis the student newspaper was not based upon the Student Discipline Code. Thus, the mere fact that Mitchell instructed Lacks not to allow students to use profanity in the student newspaper does not prove, "as a matter of law," that Lacks had sufficient notice that profanity was prohibited in her classroom creative writing assignments. *See id.* at 723-24.

Finally, the panel opinion reasons:

> The Student Discipline Code clearly prohibits profanity and obscene gestures, and it contains no exception for creative activities.
>
> . . . .
>
> [*T*]*he policy against profanity was explicit.* Lacks well knew what the plays were like before she allowed the students to perform them. In acting as she did,

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quired to apply in reversing the jury's factual finding on Lacks's First Amendment claim, the panel opinion clearly describes the virtually identical standard of review that the district court was required to apply in setting aside the school board's decision. *See Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 721 (8th Cir. 1998) ("The court may not substitute its judgment of the evidence for that of the school board, and it must consider all evidence in the light most favorable to the decision of the board. The determination of credibility of the witnesses is a function of the school board, not the reviewing court.") (citations omitted).

> she took the risk that the board would enforce the policy as written.

Id. (emphasis added). By this, the panel could mean only one thing, given the context—that the policy "as written" was "explicit" in prohibiting the use of profanity *in creative writing assignments.* I disagree.

School board policy 3043 requires teachers to enforce the Student Discipline Code, which in turn prohibits profanity and obscene gestures, among numerous other forms of "prohibited behavior." *Id.* at 720 & n.2. Nowhere does the policy explicitly state that profanity is prohibited in student creative works, and nowhere does it state that creative writing assignments qualify as "behavior." In other words, the policy was not *explicit* with respect to classroom creative writing assignments. Moreover, the jury reasonably could have concluded, under the circumstances of this case, that a teacher could reasonably assume that the language a student used in a creative writing assignment was not considered "behavior" governed by the Student Discipline Code, particularly in light of evidence that profanity in other student creative works—including one student-written play—was apparently condoned. In other words, the jury reasonably could have concluded that it also was not *implicit* in the Student Discipline Code that the profanity prohibition applied to creative writing assignments. That reasonable inference by the jury could not be overturned by the court of appeals under our highly deferential standard of review. *See Crittenden v. Tri-State Thermo King, Inc.*, 108 F.3d at 166.

I also believe that en banc review is justified in this case because it involves issues of exceptional importance. The panel highlights the fact that offensive and profane words were used more than 150 times in approximately forty minutes of the student-written plays. The panel also points to the fact that "as part of a poetry-writing exercise, Lacks had permitted a student to read aloud in a classroom two of his poems which contained profanity and graphic de-

scription of oral sex." *Id.* at 720 (citing [School Board] Hearing tr. at 386-88, 596-97). Of course, when these facts are viewed in isolation, one might wonder how suppressing or censoring such profanity could raise any First Amendment or educational issues of exceptional importance. Again, these facts, standing alone, present only a one-sided, fractional portion of the evidence. The jury was presented with a much bigger picture. For example, Lacks testified at length about the two poems mentioned above and the context in which they were read to the class. Her testimony revealed that these two poems—vulgar and shocking as they were—were the first utterances in the class by a boy named Reginald, who previously had refused to participate in class and had repeatedly been sent to the principal's office because he did nothing but put his head on his desk during class. While Lacks does not deny that she allowed Reginald to read those two poems aloud in class, she also testified that no one was aware of their content before he read them. Trial transcript (Vol. II) at 369. More importantly, however, she explained, that, after he wrote and read aloud those two poems, Reginald went on to write several more for her class, the last of which, entitled "Alone," won academic awards. These facts were entirely ignored in the panel opinion (as they apparently were ignored by the school board).

Lacks's trial testimony regarding Reginald's story is set forth below. I urge that this part of the record be fully and thoughtfully considered.

> Q. I would like to show you, Cissy, what's been marked as Exhibit 18, and ask if you can identify this document?
>
> A. Yes.
>
> Q. What is it?
>
> A. This document is a series of poems that I showed to the administrators in my District that was

done by one of my students, Reginald McNeary, when he was in ninth grade.

Q. And when was that?

A. That was in 1992.[3]

Q. At the Berkeley High School?

A. Yes.

Q. And these poems were done in which class?

A. These poems were done in the ninth grade English class.

Q. What do they illustrate, Cissy?

. . . .

A. They illustrate how a student can grow in a very short period of time using the student-centered teaching method. They illustrate that a student can learn a lot of techniques in a very short time if he or she cares about what he is doing, and they show that what a student says in the beginning is not at all the way a student might want to express him or herself, but it's what they start with because they may not have had the experience to do or say anything else.

Q. And you said you showed these poems to your administrators?

A. Yes.

Q. When did you do that?

A. I did that in a meeting that I had with them on January 25th.

Q. 1995?

A. 1995.

Q. And that was after you were suspended?

A. Correct.

Q. All right, can you start with the first poem on the top there and explain to us the significance of

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[3] It is worth noting that the events involving Reginald occurred three years before the events concerning the student plays, which led to the school board's termination of Lacks.

this poem in that learning process that you just described?

A. This poem that I'm going to read is the last poem that Reginald wrote.

Q. The last poem he wrote in what period of time?

A. In three weeks.

Q. This was a three-week poetry unit?

A. Yes.

Q. In ninth grade English?

A. Yes.

Q. First of all tell us the story of Reginald. When he came into your class, what did you observe about him?

A. Reginald came into my class and he wanted to do absolutely nothing but put his head on his desk in the back of the room. He did not talk to anyone. He did not talk to me. He wouldn't do assignments. I would send him to the guidance office, he would throw away the sheets of paper. I would send him to the principal, I would get a note back saying that I should send him during my class but he wouldn't go. I continued to send—nothing worked for Reginald. He was totally silent, toally disengaged, totally disconnected from me, from school, and he also, I learned later, because I asked about him, had had a very difficult—

MR. SUSMAN: Objection, hearsay.

THE COURT: That will be sustained.

Q. Did Reginald have any observable problems in learning, to your knowledge?

A. Yes.

Q. What were they?

A. He seemed to have a very difficult time talking to people or looking at them. I saw him write some-

thing once and he seemed to have an eye hand co-ordination problem in terms of writing.

Q. All right, did he later stop putting his head down in the class?

A. Yes.

Q. About when did that occur?

A. When we started doing the poetry writing.

Q. How did you organize physically the classroom when you began the poetry writing?

A. The class was in a circle so we could talk to each other and share work.

Q. And did Reginald sit in the circle?

A. No.

Q. Where did he sit?

A. He sat in the back of the room with his head on his desk.

Q. What did the other students do?

A. They told me that if they had to sit in the circle, Reginald would have to sit in the circle, I should force Reginald into the circle.

Q. What did you tell them?

A. I told them there is no way I could force Reginald in the circle short of picking up the desk, but that they could get him in the circle by doing things so interesting to him that he would be jealous and come into the circle.

Q. Did that happen?

A. It did.

Q. How soon after did it happen?

A. Two days after we started doing things in poetry, he started moving into the circle.

Q. Okay, and this first poem that is listed on Exhibit 18 was written you say about three weeks after he moved into the circle?

A. Yes.

Q. Okay, would you read it for us, please?

A. Sure. It's called "Alone."

I'm all alone in this world today.
No one to laugh with, no one to play.
It's been like that since the age of three.
No one to love care or hold me.
I guess that's why I'm the way I am.
No one loved me so I don't give a damn.
No one to pick me up when I fall.
No one to measure growth or how tall.
Alone, how it hurts inside.
If I were to die, no one would cry.
I never gave a damn about any other.
I love my shoes more than I love my mother.
You might think I'm the devil or call me Satan.
I have no love, I'm so full of hating.
I guess that's why I have low self-esteem.
The only time I show love is in my dreams.

. . . .

Q. Let me ask you Cissy, did this poem win any awards?

A. This poem, a somewhat corrected one won awards. This poem won the first place in the poetry contest at Berkely High School, and then I believe it also won the district-wide poetry contest in a corrected version.

Q. Corrected in what way?

A. Corrected in the grammar, and corrected a bit in the way the stanzas are organized.

Q. Did Reginald agree to enter the poem in the contest?

A. Yes.

Q. Did he read this poem in class?

A. Yes.

Q. And you said you videotaped it?

A. Yes.

Q. Why did you do that?

A. At the end of the poetry unit when people have decided what they wanted to share with people, in this particular instance for poetry, we agree to tape them and then use them again in other classes, so each year they can see what students did the year before.

Q. Okay, and then can you explain to us the process that you went through with Reginald to get him to this award-winning poem?

A. Well, Reginald heard the things that we were talking about in terms of writing, and the first exercise I believe that he saw, a tape of Quincey Troupe talking about poetry writing, and Reginald wrote a poetry exercise for us when we were reading out loud in the class, and he asked if he could read it out loud. It was the first time Reginald said anything in the class to any of us.

Q. Okay, would you like to show us what he did at that point?

A. Uh-huh.

Q. At the beginning?

A. I'm sorry, what do you mean, show it? Are you going to put it up?

Q. First of all, Exhibit 18, could you turn to the first poems that you just mentioned?

A. Okay. There is a poem called Hard Core Gangsta Pimp.

Q. And the second poem?

A. It's called Click.

Q. Let's see if I can get that. This Hard Core Gangsta Pimp poem?

A. Uh-huh.

Q. Is that the first poem he wrote in poetry class?

A. Yes.

Q. And would you agree there is a great deal of street language in there?

A. Yes.

Q. Profanity?

A. Yes.

Q. The second poem as well, the second poem called Click, the name of this poem is Click?

A. Uh-huh.

Q. Same thing?

A. Yeah.

Q. How did this poem come to be read to the class?

A. When we were doing the poetry exercises, we're just experimenting and nobody knows what anybody else has written, but when asked if they would like to share it, Reginald said that he would like to share what he had written.

Q. So he stood up and read it?

A. Yes.

Q. What did you say to him after he read these poems to the class?

A. Well, I was a little taken aback because it was also read with a lot of anger, and I told him in the class that I thought that his writing had a lot of anger in it and that sometimes you can use anger to write extremely effective poems, and that he should listen to what we were doing in the rest of the classes when we talk about technique and process, and see if he could use some of that technique to express his anger in other ways.

Q. You did not criticize him for the street language in here?

A. No.

Q. Why not?

A. I would have—I was so pleased that Reginald did something, that he made an effort to talk, it was the first time he shared anything with anybody and did anything at all in the class, I was not going to shut him down, I was going to take that and work with it. It was something, finally I had something

that he had done that I could work with, and the class could see him somewhat as part of the class and begin to respond to him. I thought it was a good moment in teaching.

Q. Did he write any poems immediately after those two?

A. Yes.

Q. Can you tell us what the next poem was in the series?

A. The next poem was called "Hate."

Q. When did he write Hate in relation to those first poems?

A. I think probably about a week and a half later.

Q. Okay?

A. Week later.

Q. Could you read "Hate" for us?

A. There is so much hate in the world today.
Some whites hate blacks and some Germans hate Jews.
But they are wrong because no one can choose.
How dark or bright or fat or light people are to be.
If it was up to me I would love all my brothers, white, Jews or any other.
For Christmas instead of begging for jewelry, instead I'm going to pray for peace.

Q. Did you see any progress then between those first poems and this one?

A. Yeah, Reginald was beginning to use all techniques and styles we had talked about. He had opened up. He was beginning to talk about the feelings that he had, but in a way, I think, that he thought other people would listen to him and that was what he now thought was effective poetry.

Q. Did he write any other poem in that three week period of time?

A. Yes.

Q. What was the next poem he wrote?

A. He wrote a poem called "Why."

Q. And is there a date on this poem?

A. December 8th, 1992.

Q. Could you read "Why" for us?

A. Why.

Why do they stare at me when I'm [maxin']?
Is it 'cus I'm not the color that they are [axin'].
They whisper in silence.
I guess they think I'll cuss.
Violence, why, why couldn't God make us one color
Instead of black and white, and many others.
Why, why when you look at me you look in fear
When I have never beat you up or made you shed a tear.
Why can't we all just get along living in harmony.
Is that too wrong?
My sisters are labeled hooker and whore bang-in'
And they have got my brothers dope and gangbanging'.
Why are my people living in poverty and the rich don't care how they be?
Now I know this is the worst poetry you [ever heard]
but it comes from the heart.
I wrote every word.

Q. Did you see any progress here?

A. I saw incredible progress. He is starting to use a certain style now and a rhythm to his writing, and it's real clear that he also has a position and he wants other people to know what it is and when he read it he told us what this poem came from.

Q. And then the last poem in the serious was the "alone" poem you read to us.

A. The last poem was the "Alone" poem.

Q. And how would you evaluate "Alone" as a piece of poetry?

A. I think that the person who wrote this poem is not a student poet but a poet. I think he is like Langston Hughes. He has an incredible way with words, and it makes people cry, in class, or just be so moved by what he is saying the doing, it's, you know, it's really amazing as a poem.

Q. Who chose his poem to win the district-wide poetry contest?

A. I'm not sure. I didn't. There were judges in the District who did.

Q. And by the way, the poem "Alone" which won the districtwide poetry contest, does that have any street language in it?

A. Yes, it does.

Q. I never gave a damn about any other?

A. Uh-huh, twice.

Q. Considerably less than that what Reginald included in his first two poems, would you agree?

A. Yes.

Q. And how do you explain that progress?

A. Well, to me I see it all the time, that once a student opens up and starts expressing himself or herself and then learns the process or the techniques and they hear people listening to them, they just want to begin to change what they are doing, so it's quite,

it just seems to me it is a quite natural learning process. It's part of the student-centered method.

Q. You also talked to us about peer critique, and I'm interested to know how did the class respond to Reginald's first two poems?

. . . .

Q. Did the class respond to Reginald's first two poems?

A. The class as I recall was taken aback. They just listened, but at the same time said, "Reginald, good, you talked," that's what I remember. "Reginald, you said something."

Q. Okay, and how did they react to the poem "Alone"?

A. They actually cheered and clapped for him when he read it.

. . . .

Q. Okay. You told us earlier that you took these poems to the administrators to explain to them your teaching process in January of '95 after you had been suspended. Did you take all the poems to them?

A. Yes.

Q. Did you explain to them as you explained to us today the teaching process?

A. Yes.

Q. Who did you explain this to?

A. I explained it to John Wright, Vernon Mitchell and Barbara Davis.

Q. Now, you went to the Board termination hearing regarding your termination, is that correct?

A. Yes.

Q. And the District included a couple of Reginald's poems in its evidence against you, didn't it?

A. Yes.

Q. How did they come to have these poems?

A. I brought them all five of these poems, that's how they came to have them.

> Q. Did the administrators show the Board Reginald's award-winning poem?
>
> A. No.
>
> Q. What did you think about that?
>
> A. I was so discouraged, I didn't even know what teaching was about any more. They showed the first two poems that Reginald wrote and didn't show anything else, somehow seemed to have lost or forgotten all the other poems. Very discouraging for a teacher and also for the student who had written the poems.

Id. at 360-76.

The school district now argues that "[p]etitions for rehearing or hearing en banc should not be granted when the resolution of a case affects only the parties immediate to the action." Response to Suggestion for Rehearing En Banc at 1 (citing *Schwieger v. Iowa Beef Processors, Inc.*, 816 F.2d 1217, 1219 (8th Cir. 1987)). The outcome of this appeal does not affect only the parties to this action. It affects all innovative and well-meaning teachers like Lacks and students in need like Reginald. When good educators are scared away or driven from our schools because they cannot trust the system to treat them honestly and fairly, we are all affected, most especially our children. As the Supreme Court declared over thirty years ago,

> [o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." . . . ". . . No one should underestimate the vital role in a democracy that is played by those who guide and train our youth."

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms;" . . . "[f]or standard of permissible statutory vagueness are strict in the area of free expession. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." . . . When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone * * * ." . . . For the "[t]hreat of sanctions may deter * * * almost as potently as the actual application of sanctions." . . . The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967) (citations omitted).

As I indicated at the outset, I am not condoning the use of profanity in our schools or every aspect of Lacks's teaching methodology. But the jury found in this case, based upon *all* the evidence and their assessments of credibility, that Lacks was not given reasonable notice that profanity was prohibited in her creative writing assignments. If she had been given such notice, this whole matter could have been avoided. In this day and age, while our children are being exposed to the worst aspects of society through the media, entertainment, and sometimes even in their own homes, we expect public school teachers to erase the effects of that environment and make even the most uninspired children learn and achieve. Meanwhile, we require our teachers to pick their way through a mine field of competing and conflicting expectations, and changing and elusive legal standards. This case stands for the proposition that, for all her hard work and devotion to *all* her students, this teacher was in the end fired

for stepping on a political land mine—one which she never even knew was there. This case was wrongly decided. I vote to grant the petition for rehearing en banc.

A true copy.

Attest:

U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
E.D. MISSOURI

No. 4:95CV1024 CDP

CECILIA LACKS,

Plaintiff,

v.

FERGUSON REORGANIZED SCHOOL DISTRICT, R-2,

Defendant.

Aug. 15, 1996

MEMORANDUM AND ORDER

PERRY, District Judge.

This matter is before the Court on Count I of plaintiff's complaint, which seeks judicial review of the school board's March 23, 1995 decision to terminate plaintiff's indefinite teaching contract. Also before the Court is defendant's motion for partial summary judgment as to Count III of plaintiff's first amended complaint.

Defendant Ferguson Reorganized School District, R-2 ("the district") terminated plaintiff Cecilia Lacks from her position as a tenured school teacher because she allowed her students to use profanity in the poems and plays they wrote for her English class, which defendant found violated a district rule prohibiting student profanity. In her first amended complaint, plaintiff seeks judicial

review of the school board's termination decision under Missouri law, Mo.Rev.Stat. §168.120 (Count I), alleges that defendant violated the Due Process Clause (Count II) and First Amendment (Count III) to both the United States and Missouri constitutions, and alleges that defendant discriminated against her based on race under both federal and Missouri law (Counts IV and V). By order dated March 14, 1996, this Court dismissed plaintiff's due process claims (Count II), and pursuant to that order also dismissd the two individual defendants. Therefore, the sole remaining defendant is the district. In its March 14, 1996 order, the Court also denied defendant's motion to dismiss plaintiff's First Amendment claims. The remaining claims in this case, other than plaintiff's request for judicial review of the board's decision, are set for jury trial on November 4, 1996.

I. Factual Background

Plaintiff Lacks had an indefinite teaching contract with defendant school district, where she had taught since 1972. Plaintiff had been teaching at Berkeley Senior High School since 1992. During the 1994-95 school year (until she was terminated in March of 1995), plaintiff taught English and journalism at Berkeley. In addition, as part of her journalism class, plaintiff sponsored the school newspaper, which had not been published for several years before she revived it in 1993.

Plaintiff selected a curriculum for her English class in the fall of 1994 that included viewing, reading and writing drama. From September 28 to October 10, 1994, the students worked on a drama writing assignment in which the class was divided into six small groups, and each group had to write and perform a short play. On or about October 10, 1994, the students performed their plays and were videotaped by a district employee. The plays written and performed by the students contained extensive profanity, including frequent use by the students of the words "nig-

ger," "fuck," "bitch," "ass," and "shit." Plaintiff had reviewed the students' scripts before the plays were produced, and also viewed the videotapes of the plays with the students in class. Plaintiff did not encourage or discourage the use of profanity by her students in the drama assignment or any other creative-writing assignment, nor did she generally discuss the use of profanity in the plays or other creative works with her students after the fact.

Plaintiff's contract for employment, which she signed prior to the 1994-95 school year, stated that she "had received and read the rules and regulations and the statement of policies of the Board of Education . . ." The district's 1994-95 policies and procedures contained a student discipline policy (board policy number 3043) that incorporated the "student discipline code" ("the code"). The code prohibits certain student behavior, both Type I (more severe) and Type II (less severe). Under the code, "Type II Behavior includes . . . profanity . . . and any other inappropriate behavior as defined by school officials." At all relevant times, plaintiff's classroom contained signs that prohibited profanity. Outside of class-related creative activities, plaintiff did not tolerate the use of profanity or other disruptions by her students.

Plaintiff did not censor student profanity in the students' plays and poems because of her teaching approach, referred to as the "student-centered method," in which teachers do not censor the creative expressions of their students so that the students can find their own voice and have that voice accepted as is before it is ultimately refined. The student-centered method used by plaintiff is nationally accepted and plaintiff herself was successful with the method. During her career, plaintiff was praised by administrators and teachers inside and outside of the district for her succes as a teacher. There are alternative methods of teaching creative writing that do not allow students to use profanity and that are successful. Plaintiff is familiar with some of these methods and has briefly experi-

mented with them, but has never used them for an entire semester.

On or about January 10, 1995, Vernon Mitchell, principal at Berkeley, learned about the videotapes of the plays performed by plainntiff's students in October 1994. Mitchell, along with Barbara Davis, the district's Assistant Superintendent of Curriculum Instruction, and Dr. John Wright, the district's Assistant Superintendent for Personnel, immediately viewed some of the plays. Plaintiff met with the administration on January 25, 1995, and explained her method of teaching in general and the drama assignment in particular.

On January 27, 1995, Dr. Robert Fritz, the district's Superintendent of Schools, formally charged plaintiff with willful or persistent violation of the published regulations of the Board of Education. Dr. Fritz alleged that plaintiff had violated numerous board policies and recommended that the board terminate plaintiff's indefinite teaching contract. Plaintiff made a timely request for a hearing by the school board, and a hearing was held on March 1, 2, 6, 7 and 9, 1995. At the hearing, defendant narrowed its charges to one: violation of board policy 3043 prohibiting student profanity. Defendant relied on the videotapes of the six plays and on two poems written by one of plaintiff's students, each of which contained extensive profanity. On March 23, 1995, the school board issued its Findings of Fact and Conclusions of Law, signed by Board President Leslie S. Hogshead, by which it terminated plaintiff's indefinite teaching contract effective that same day. The Board concluded that the plays and poems contained "extreme profanity" and that plaintiff's "conduct relative to [those plays and poems] and to similarly permitted and admitted prior teaching assignments of Teacher violated Board policy 3043, in a willful or persistent manner."

II. Judicial Review of Board Decision (Count I)

A. Standard of Judicial Review

Under Missouri law, the board of education of a school district can terminate an indefinite contract with a permanent teacher for six statutory reasons, including willful or persistent violation of a board regulation. Mo.Rev.Stat. § 168.114(1). Terminated teachers can appeal the decision of the board to the circuit court of the county where the employing district is located, and such appeals "shall be heard as provided in chapter 536, RSMo." *Id.* § 168.120. Under chapter 536, which governs administrative procedure and review, courts may overturn a school board's decision if the decision:

> (1) Is in violation of constitutional provisions;
>
> (2) Is in excess of the statutory authority or jurisdiction of the agency;
>
> (3) Is unsupported by competent and substantial evidence upon the whole record;
>
> (4) Is, for any other reason, unauthorized by law;
>
> (5) Is made upon unlawful procedure or without a fair trial;
>
> (6) Is arbitrary, capricious or unreasonable;
>
> (7) Involves an abuse of discretion.

Id. § 536.140(2). Plaintiff filed a timely appeal of the board's decision with the Circuit Court of St. Louis County, and defendant removed the case to this court. The Court has supplemental jurisdiction over this state-law claim under 28 U.S.C. § 1367, and must apply Missouri law in reviewing the board's decision. See, e.g., *Carrington v. Mahan*, 51 F.3d 106, 107 (8th Cir. 1995).

Plaintiff challenges the school board's decision to terminate her contract on four grounds: (1) the evidence does not support the board's finding of plaintiff's willful and

persistent violation of board policy 3043 because the policy does not apply to creative works and because there is no evidence of willfulness or persistence; (2) the board's decision was arbitrary, capricious and unreasonable in that the board failed to follow its own policies governing academic freedom and student publications; (3) the board's decision is unauthorized by law and made pursuant to unlawful procedures in that defendant has attempted to disguise an incompetency allegation as a violation of board policy, and defendant did not follow the heightened procedural requirements of a termination for incompetency; and (4) plaintiff did not receive a fair hearing under Missouri law because defendant did not allow her to depose two individuals and did not allow all of her witnesses to testify at the hearing. Because the board's decision that plaintiff "willfully or persistently" violated board policy 3043 is unsupported by competent and substantial evidence upon the whole record, the decision of the board will be reversed and the Court will not examine plaintiff's alternative arguments.

B. Discussion

In its decision, the board stated that plaintiff was terminated because "[t]he Board has clearly established a prohibition of profanity by students in policy number 3043; this is the policy under which Teacher has been charged and which Teacher has willfully or persistently violated." Missouri law allows school districts to terminate the contracts of tenured teachers based on "[w]illful or persistent violation of, or failure to obey, the . . . published regulations of the board of education of the school district employing [her]." Mo.Rev.Stat. § 168.114(1)(4). In reviewing the evidence as to whether plaintiff's actions were willful or persistent, this Court must afford appropriate weight to the board's evidentiary findings:

> [T]he evidence must be considered in the light most favorable to the board's decision, together with all

> reasonable inferences where supported. If evidence before an administrative body would warrant either of two opposed findings, the reviewing court is bound by the administrative determination and it is irrelevant that there is evidence to support a contrary finding. Finally, the determination of the credibility of witnesses is a function of the administrative tribunal.

Hudson v. Wellston Sch. Dist., 796 S.W.2d 31, 33 (Mo. Ct.App.1990) (citations omitted).

Several Missouri courts have addressed the meaning of "willful" and "persistent" as used in § 168.114(1)(4). The Supreme Court of Missouri has stated:

> "Willful" has been defined as "done deliberately; not accidental or without purpose; intentional" and "persistent" as "continuing in a course of action without regard to opposition."

Board of Educ., Mt. Vernon Schools v. Shank, 542 S.W. 2d 779, 782 (Mo.1976) (en banc). Other Missouri courts have examined the degree of intent required under § 168.114(1)(4):

> Is it enough . . . that the offender intends to act, and the action taken happens to be inconsistent with a regulation, or must he or she act with the intention of violating or failing to obey a regulation? The first of these interpretations merely involves one intention, viz. to act in the absence of reflex or coercion; the second involves two intentions, viz. one to act and one to violate or disobey. We believe the latter interpretation provides the meaning intended by the legislature.

Carter County Sch. Dist., R-1 v. Palmer, 582 S.W.2d 347, 349 (Mo.Ct.App.1979); *see also Burgess v. Ferguson Reorganized Sch. Dist., R-2*, 820 S.W.2d 651, 656 (Mo. Ct.App.1991). Therefore, to support a finding that a

teacher violated § 168.114(4), Missouri courts require school districts to establish (1) an intent to act And (2) an intent to violate or disobey a particular regulation. *Ortbals v. Special Sch. Dist. of St. Louis County*, 762 S.W.2d 437, 440 (Mo.Ct.App.1988).

In this case, defendant established the "intent to act" element because plaintiff admitted that she does not censor profanity in her students' creative works. The issue, therefore, is whether plaintiff had an "intent to violate or disobey a particular regulation," i.e., board policy 3043. The board made no specific finding as to plaintiff's intent to violate policy 3043, but presumed such intent because plaintiff was aware that policy 3043 incorporated the student discipline code that prohibited student profanity. Plaintiff argues, however, that she did not know that policy 3043 applied to profanity in class-related creative assignments. Defendant argues that there is no exception for class-related profanity on the face of policy 3043. Defendant also argues that plaintiff had been put on notice that the policy applied to creative works by Principal Mitchell's warnings to plaintiff regarding profanity in the student newspaper. Plaintiff denies having received any warnings about profanity in the newspaper.

The record as a whole clearly indicates that there was in practice an unwritten exception in the district for profanity in class-related activities. The evidence presented to the board was overwhelming that many administrators and teachers in the district allowed class-related profanity depending on the context and degree of profanity. The relevant evidence can be summarized as follows:

- In the 1993/94 school year, plaintiff showed Mitchell a student journal entry containing the words "honkey" and "chink." and the statement if "I ever see a white are [sic] a Jew touch me I'm going two kill them . . ." and Mitchell did not discuss the language with plaintiff or the student, nor did

he discipline either plaintiff or the student. (Tr. 202).

- A play written and performed by Berkeley students for the entire student body and attended by Mitchell contained profanity, including at least the word "damn," as well as other conduct classified as Type II violations of policy 3043. (Tr. 209-12). Neither the teacher supervising that play nor the students performing it were disciplined in any way. (Tr. 214-16).
- Dr. John Wright, assistant superintendent, testified regarding the plays produced in plaintiff's class that "if [the students] were not doing this in a play, they would have been suspended, it would have been Type I or Type II behavior in the classroom." (Tr. 116).
- Wright testified that he did not know whether a student who reads profanity aloud from another author's work could be punished. (Tr. 100).
- Karen Price, Chair of the English Department at Berkeley, testified that she was not aware of a rule that required teachers to censor profanity in creative works. (Tr. 813). Price also testified that she was not aware that a student reading profanity from literature could be charged with violating the student discipline code. (Tr. 823).
- Dr. Larilyn Lawrence, the district's Curriculum Coordinator for Language Arts, testified that she did not know of a policy prohibiting students from reading profanity in literature aloud. (Tr. 845).
- Delores Graham, principal at a middle school in the district, was not aware that a student reading profanity from a creative work of literature or that student's teacher would be violating the student discipline code. (Tr. 892).

- James Nicholson, a playwright who visited plaintiff's classes, testified that he was present when district administrators heard students read profanity from their own creative works, but no administrator ever told him or plaintiff to disallow profanity in the students' creative expression. Nicholson testified that no policy was "verbalized to me or given to me in print." (Tr. 318).

- C.S., a former student of plaintiff, testified as follows: "I didn't realize that expressing yourself in a play when, you know, I didn't realize if you express yourself, you could get in trouble for that. But I realize that if you are using profanity and doing other things in the hallway or any place else in the school, that you could get in trouble." (Tr. 852).

- P.S., a former student of plaintiff, testified that she performed creative writing assignments containing profanity in the presence of a district administrator and the administrator "didn't give a reaction, so we just basically, we went with the flow." (Tr. 510).

Defendant submitted no evidence indicating that the district in fact enforced policy 3043 to prohibit students from reading aloud or otherwise using profanity in creative works.[1] The only evidence that a district employee in-

[1] Defendant attempts to characterize Mitchell's alleged warnings to plaintiff about profanity in the student newspaper as evidence that plaintiff knew profanity was not allowed in any student creative works. Defendant's attempt is unconvincing because there is a separate board policy (number 2053) entitled "student publications" that requires teachers and students to judge the "appropriateness" of materials and to edit "obscene" and other material from the student newspaper and yearbook. Mitchell's enforcement of this specific policy does not translate to an interpretation that profanity is not allowed in student poems and plays under policy 3043, which governs student behavior. In fact, policy 2053 begins with the following statement: "The Board recognizes creative stu-

terpreted policy 3043 as defendant has interpreted it even after plaintiff's termination was the testimony of Barbara Davis, assistant superintendent. Davis testified that it would not be acceptable for a student to read aloud from a book or play that contained profanity, and that such behavior by a student "could be" a violation of the student discipline code. (Tr. 785-87). Further, when asked how teachers were to know that having student read profanity in creative works aloud could get them terminated, Davis testified that "teachers use judgment on that." (Tr. 791-92). When asked whether teachers in the district know they can be terminated for reading a play with profanity aloud in their classroom, Davis responded "I'm sure they do now." (Tr. 797). Davis' interpretation of policy 3043, which contradicts evidence from every other administrator or teacher who testified at the hearing, is not sufficient to prove that plaintiff or anyone else actually knew that policy 3043 prohibited extreme profanity by students in creative works.

Rather, as the foregoing evidence demonstrates, there was no agreement or understanding within the district regarding how the use of profanity by students both in reading literature aloud and in the students' own creative expressions would be treated under the student discipline code.[2] Davis said reading aloud literature containing profanity could violate the code; Lawrence, Price and Graham said that it would not. Students did not know that reading profanity—whether profanity written by other authors or

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dent expression as an educational benefit of the school experience. One medium of expression is student journalism." The policy proceeds to expressly limit the content of student journalism, but does not address limitations on any other form of creative student expression.

[2] Although the Court notes that plaintiff was not charged with allowing students to read other authors' works aloud, it is relevant to the fact that the district drew lines in practice that were not expressly drawn in policy 3043.

by students—could lead to discipline, and students did in fact read profanity aloud in front of administrators of the district and were not disciplined. The students who performed the plays in plaintiff's class were not disciplined, according to one administrator, specifically because the profanities were part of a play. Price and Lawrence, who were called on by the administration to offer written statements regarding the videotapes, testified that they did not believe that a teacher who allows profanity in creative writing violates the student discipline code.

C. Conclusion

The board has apparently attempted to draw the line at the extreme use of student profanity. In the "Conclusions of Law" section of the board's decision, the board states that "District Exhibits 10, 11, 12 and 13 contain extreme profanity." (Emphasis added). In addition, the board stated in the "Conclusions of Law" section that "Teacher's conduct within the District was an isolated, willful and persistent practice violative of Board policy to a degree that cannot be, will not be and otherwise has not been tolerated." (Emphasis added). On the other hand, neither teacher nor student were punished for the statement "I'll blow your damn head off" in a student play, for using racial and ethnic slurs in a student journal, or for a student's use of the word "damn" in a prize-winning poem.

It may be the board's desire to draw lines with respect to student profanity, and the Court agrees that the board has the authority to establish and interpret its own policies. *State ex rel. City of Springfield v. Public Serv. Comm'n*, 812 S.W.2d 827, 833 (Mo.Ct.App.1991). However, the board never drew these lines in board policy 3043, until it chose to terminate plaintiff for violating the policy. On its face, policy 3043—contained in the student behavioral code—prohibits student profanity and other disruptive behavior. On its face the policy refers to student behavior, not to a student's performance of a play, or to a student's reading aloud another's writing, or

to a student's own written work produced as part of a class assignment. The evidence overwhelmingly shows that in practice, student profanity in creative expression was allowed to a certain degree. The board could only have concluded that plaintiff intended to violate policy 3043 if it concluded that plaintiff knew that the policy prohibited student use of profanity in creative works. This conclusion that plaintiff (or anyone else in the district) interpreted policy 3043 as the board has interpreted it—to allow some profanity but not extreme profanity in creative works—is simply not supported by the evidence presented to the board. Accordingly, defendant did not establish that plaintiff "willfully or persistently" violated board policy 3043. For that reason, the board's decision must be reversed.

D. Relief

Missouri law provides that, if a court finds for the teacher on appeal, the teacher "shall be restored to permanent teacher status and shall receive compensation for the period during which he may have been suspended from work, and such other relief as may be granted by the court." Mo.Rev.Stat. § 168.120(4). In addition to the statutory relief, plaintiff also seeks attorneys' fees and costs, and expungement of any reference to her termination from plaintiff's record. As required by Missouri law, the Court will order defendant immediately to reinstate plaintiff to her position as a teacher with an indefinite teaching contract and to compensate plaintiff from the date she was suspended by the district through the date of her reinstatement. Mo.Rev.Stat. § 168.120(4). In addition, the Court finds it appropriate to order defendant to expunge all references to plaintiff's termination and to these proceedings from plaintiff's personnel file. Finally, the Court will award plaintiff reasonable attorney's fees and costs related only to her appeal of the board's decision, i.e., Count I of plaintiff's complaint.

II. Collateral Estoppel

During this litigation, the parties have raised the issue of collateral estoppel (also known as issue preclusion) with respect to the effect of the board's decision on plaintiff's remaining legal claims for relief, which are set for jury trial in November 1996. The Missouri law of issue preclusion governs this case. *Simmons v. O'Brien*, 77 F.3d 1093, 1096 (8th Cir.1996). Under Missouri law, courts consider the following factors to determine whether collateral estoppel applies: (1) is the issue in the present case identical to the issue decided in the prior adjudication; (2) was there a judgment on the merits in the prior adjudication; (3) is the party against whom collateral estoppel asserted the same party or in privity with a party in the prior adjudication; and (4) did the party against whom collateral estoppel is asserted have a full and fair opportunity to litigate the issue prior to suit. *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 500 (Mo. 1991) (en banc).

Because there is no longer a prior "judgment on the merits" under the second factor, collateral estoppel does not apply in this case: "When an appellate court vacates a judgment, the lower court's judgment cannot be considered a final judgment on the merits for purposes of collateral estoppel." *State v. Nunley*, 923 S.W.2d 911, 922 (Mo.1996) (en banc). In this order, the Court reverses the decision of the school board; therefore, there is no final judgment on the merits for purposes of collateral estoppel. Furthermore, with respect to the timing of this Court's ruling on Count I, the Court notes that *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), holding that a district court should not make factual determinations that are common to equitable and legal claims before the legal claims are heard by a jury, does not apply in this case because the Court did not make any factual determinations in ruling on Count I of plaintiff's

complaint. Rather, the Court held only that the board's decision was not supported by competent evidence. Accordingly, collateral estoppel does not apply in this case and the jury deciding plaintiff's remaining claims will not be bound by any prior decision in this case, either by the school board or by this Court.

III. Motion for Summary Judgment (Count III)

Defendant filed a motion for partial summary judgment on Count III of plaintiff's complaint, in which plaintiff alleges that defendant violated her rights under the First Amendment. In its motion, defendant essentially argues that the Supreme Court has concluded, as a matter of law, that schools can prohibit profanity. Plaintiff argues that there is no per se rule allowing schools to prohibit any and all profanity; rather, the Court must apply the "legitimate pedagogical concerns" test in this case.

The Court disagrees with defendant's contention that the Supreme Court has concluded that schools can prohibit profanity regardless of the circumstances. The two most relevant Supreme Court cases upholding a school's right to prohibit profanity, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), are distinguishable from the present case. In Hazelwood, the Court upheld the school's right to prohibit profanity in a student newspaper. In Bethel, the Court upheld the school's right to discipline a student for making a lewd and offensive speech in front of 600 students in the context of a fellow student's campaign for an elected class office.

First, these cases are distinguishable from the present case because they both involved public dissemination of profanity. The Court in *Bethel* noted: "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Bethel*, 478 U.S. at 683. In the present case, the evidence shows that the student profanity al-

lowed by plaintiff was for in-class educational purposes only, and was specifically not to be disseminated outside of the classroom. Second, the Supreme Court cases are distinguishable from this case in that neither *Hazelwood* nor *Bethel* involved a teacher asserting her right to allow profanity that allegedly has a constructive educational purpose. The teacher's allegations in this case require a balance of the school's interest and the teacher's interest. Although the Court recognizes that schools have broad authority to prohibit student profanity, *Hazelwood* and *Bethel* do not require this Court to hold, as a matter of law, that defendant can prohibit profanity in its schools regardless of the context.

Rather, *Hazelwood* contains the appropriate legal standard to apply in this case: Was defendant's termination of plaintiff reasonably related to legitimate pedagogical concerns? *Hazelwood*, 484 U.S. at 273. Application of this legal standard will inherently require the appropriate balance of the school's interest in prohibiting profanity and the teacher's interest in using the teaching method at issue in this case. In applying the "pedagogical concerns" test, it is appropriate to consider "among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation." *Silano v. Sag Harbor Union Free Sch. Dist. Bd.*, 42 F.3d 719, 723 (2d Cir.1994), *cert. denied*, 115 S.Ct. 2612 (1995).

At trial, defendant must establish its pedagogical concerns relating to the prohibition of this particular profanity, and must also establish that the termination of plaintiff was an action reasonably related to these concerns. On the other hand, plaintiff must show that her termination was not reasonably related to legitimate pedagogical concerns. On all of these issues, many factual disputes remain. For example, the parties disagree as to the effectiveness of plaintiff's teaching method and as to the effectiveness of other teaching methods that do not

allow profanity. Therefore, because genuine issues of material fact remain, defendant's motion for partial summary judgment on plaintiff's First Amendment claims will be denied. There is a sub-element of plaintiff's First Amendment claim: whether defendant afforded plaintiff appropriate notice under the First Amendment that her actions were prohibited. In its order denying defendant's motion to dismiss on this issue, the Court noted that two Supreme Court cases contained potentially conflicting standards with respect to notice. The Court now agrees with defendant and is convinced that the First Circuit has articulated the appropriate standard with respect to the notice required in the context of the First Amendment rights of high school teachers:

> Indeed, this circuit has long recognized a teacher's right to notice of what classroom conduct is prohibited. Of course, while we acknowledge a First Amendment right of public school teachers to know what conduct is proscribed, we do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers. The relevant inquiry is: based on existing regulations, policies, discussions, and other forms of communication between school administrators and teachers, was it reasonable for the school to expect the teacher to know that her conduct was prohibited?

Ward v. Hickey, 996 F.2d 448, 453-54 (1st Cir.1993) (citations omitted) (emphasis added). Under the foregoing standard, the Court has no doubt that several factual disputes remain in this case. For example, the parties dispute whether Mitchell warned plaintiff about profanity in the student newspaper, and if he did, what effect those warnings had on plaintiff's understanding of board policy 3043 and its application to non-newspaper, class-related creative expression. These factual disputes preclude summary judgment, and defendant's motion for partial sum-

mary judgment as to the notice aspect of plaintiff's First Amendment claim will be denied.

Accordingly,

IT IS HEREBY ORDERED that, pursuant to plaintiff's request under Missouri law for judicial review of the school board's March 23, 1995 decision, the decision of the school board is reversed.

IT IS FURTHER ORDERED that defendant shall reinstate plaintiff to her position as a teacher with an indefinite teaching contract and shall compensate plaintiff from the date she was suspended by the district through the date of her reinstatement as required by Mo.Rev.Stat. § 168.120(4).

IT IS FURTHER ORDERED that defendant expunge all references to plaintiff's termination and to these proceedings from plaintiff's personnel file.

IT IS FURTHER ORDERED that plaintiff is awarded reasonable attorney's fees and costs related only to her appeal of the board's decision, i.e., Count I of plaintiff's complaint.

IT IS FURTHER ORDERED that defendant's motion for partial summary judgment [# 46] on Count III (First Amendment) of plaintiff's complaint is denied.

A Partial Judgment in accord with this order is entered this date.

Supreme Court, U.S.
FILED
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No. 98-983

In The

Supreme Court of the United States

October Term, 1998

CECILIA LACKS,

Petitioner,

v.

FERGUSON-FLORISSANT REORGANIZED SCHOOL DISTRICT, R-2,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS A. MICKES
Counsel of Record

MELANIE GURLEY KEENEY
RICHARD H. KUHLMAN
BLACKWELL SANDERS PEPER MARTIN LLP
720 Olive Street
24th Floor
St. Louis, Missouri 63101
(314) 345-6000

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals properly reversed the jury's verdict in favor of Petitioner on her First Amendment claim and directed that judgment be entered in favor of Respondent where, *assuming* the existence of a "notice" requirement under the First Amendment, Petitioner acknowledged the existence of Respondent's policy against the use of profanity, yet permitted student use of profanity under the guise of a particular teaching method?*

2. Whether the Eighth Circuit Court of Appeals properly reversed the jury's verdict in favor of Petitioner on her race discrimination claim and directed that judgment be entered in favor of Respondent where Petitioner provided no evidence that Petitioner's allegedly racially biased supervisors tainted the process resulting in Petitioner's termination?

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*Respondent respectfully suggests that Petitioner's first question presented ignores the threshold issue of whether Petitioner's speech is protected in the first instance. Moreover, even assuming, *arguendo*, that Petitioner's speech is protected, thus invoking the First Amendment, Petitioner fails to precisely articulate the First Amendment issue before this Court and misrepresents the conclusion reached by the Eighth Circuit Court of Appeals in this regard. The Board of Education is the sole entity responsible for defining and implementing the curriculum taught in our schools. No individual teacher's rights are so broad as to supplant the fundamental responsibility and obligation of the Board of Education to educate children.

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INTRODUCTION

Certiorari should not be granted in this case, as the issues raised by Petitioner have been addressed and adjudicated consistently, on numerous occasions, by courts throughout the country. Furthermore, the decision of the United States Court of Appeals for the Eighth Circuit is entirely consistent with that precedent, thus obviating the need for this Court to exercise its supervisory authority.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 147 F.3d 718 (8th Cir. 1998). Petitioner filed a Motion for Rehearing and Rehearing En Banc, which the Eighth Circuit Court of Appeals denied. However, Judge McMillian dissented from the denial of rehearing en banc. His opinion is reported at 153 F.3d 904 (8th Cir. 1998). Although not at issue in this Petition, the Order of the United States District Court for the Eastern District of Missouri, entering summary judgment in favor of Respondent on Petitioner's Due Process claim, is reported at 936 F. Supp. 676 (E.D.Mo. 1996). Respondent is not aware of the existence of any officially reported judgment or order entered by the United States District Court for the Eastern District of Missouri following the jury's verdict on Petitioner's remaining claims.

JURISDICTION

Jurisdiction over this Petition is proper pursuant to 28 U.S.C. § 1254(1). However, Petitioner fails to proffer a sufficient basis to invoke this Court's review.

Supreme Court Rule 10 provides in relevant part:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Supreme Court Rule 10.

Petitioner claims that this Court has thus far not addressed the issues asserted in this Petition and that the decision of the Eighth Circuit Court of Appeals conflicts with decisions of other United States appellate courts. To

the contrary, the leading authority relevant to the issues in this case is entirely consistent with the Eighth Circuit's opinion. At most, the instant Petition constitutes re-argument. Further, Petitioner fails to provide any substantive, much less persuasive, reasons why the issues in this case may correctly be characterized as "important questions of federal law." Therefore, denial of the instant Petition is appropriate.

STATEMENT OF CASE

A. Respondent's Version

In or about October, 1994, Petitioner Cecilia Lacks, a Caucasian, tenured teacher, directed her eleventh-grade English Class to write and perform a short play. Petitioner reviewed the students' plays and ultimately directed her students to perform their plays before the entire class, while being videotaped. Subsequently, students, and perhaps others, reviewed the videotaped performances. Copies of the videotapes are submitted contemporaneously herewith as the appendix to Respondent's Brief in Opposition To Petition For Writ Of Certiorari.

Several weeks later, the District learned, for the first time, that these plays contained extreme, offensive levels of profanity, in addition to simulated acts of sexual intercourse, desecration of a corpse, gang violence, as well as other similarly mature subjects. In fact, during the thirty-eight-minute running time of the plays, words like "nigger," "fuck," "shit," "bitch," and "mother-fucker" were

used over 165 times or once every twelve seconds. Tr. Tr. 286.[1]

The use of profanity, such as the language depicted in the videotapes, is contrary to the Board's Student Discipline Policy and is contrary to any semblance of accepted behavior. Based on the videotapes, as well as evidence of other instances of profane, vulgar and inappropriate language used by students in Petitioner's classroom, under Petitioner's auspices, the Board terminated Petitioner's employment.

Petitioner admits that the plays contained an extreme quantity of profanity. Petitioner also concedes that the Board's "policy against the use of profanity . . . [is not] arbitrary," and that she in fact knew that this Board had such a policy. Hrg. Tr. 544. Similarly, Petitioner's own expert acknowledges that a school district is duty-bound to set standards of student decorum and to establish minimum levels of civility, including restricting the use of profanity in student-written, creative works. Tr. Tr. 883-84. Further, Petitioner concedes that she was contractually bound to enforce the student discipline code, Tr. Tr. 562-63, and that, in fact, she had disciplined students in the past for using profanity. Tr. Tr. 452, 1037.

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[1] "Tr. Tr." and "Tr. Exh." refer to the official trial transcript and the exhibits introduced at trial, respectively. Similarly, "Hrg. Tr." and "Hrg. Exh." refer to the transcript and exhibits from the hearing conducted before the School District's Board of Education regarding the termination of Petitioner's employment. Finally, "App." refers to the appendix submitted with Respondent's initial brief before the Eighth Circuit. Respondent is prepared to provide copies of any and all materials upon request of the Court.

Despite Petitioner's confessed awareness of Board Policy, she commenced the underlying action, alleging that the District denied Petitioner her rights under the Missouri Teacher Tenure Act, the Due Process Clause and the First Amendment. Further, Petitioner claims that the Board terminated Petitioner because of her race. Ultimately, the United States Court of Appeals for the Eighth Circuit directed that judgment be entered in favor of the District on all claims of Petitioner's Complaint.

On or about September 17, 1998, the Eighth Circuit denied Petitioner's Motion for Rehearing and Rehearing En Banc. The matter is now before this Court to consider whether, pursuant to Supreme Court Rule 10, consideration by this Court is appropriate to review the disposition of Petitioner's First Amendment and race discrimination claims. Petitioner abandoned her claims under the Missouri Teacher Tenure Act and her Due Process claims.

B. Petitioner's Statement of the Case is in Error.

1. Contrary to Petitioner's contention, the Board did not terminate Petitioner's employment because she "failed to discipline students." Rather, the Board terminated Petitioner's employment because she willfully and persistently violated Board Policy by permitting, if not promoting, the egregious conduct depicted in the videotapes and the poems. *See, e.g.*, App. 901-906, Board Findings, ¶ 21; Tr. Tr. 2015. In fact, based *solely* on the videotapes, the Board believed that the violation was "sort of obvious." Tr. Tr. 2015.

Petitioner's contention that Board Policy "had not been applied or been understood to apply to profanity used in work [sic] of fiction or creative writing . . . " is entirely unsupported and unavailing. There is absolutely no evidence of any conduct comparable in content, scope or magnitude to the events depicted in the record before this Court.

2. In framing the issues before this Court, Petitioner erroneously states that the allegedly racially biased supervisors, Vernon Mitchell and John Wright, played "crucial roles in the termination process. . . . " To the contrary, the Board, comprised of seven Caucasian persons, Tr. Tr. 1908-09, unanimously agreed that Petitioner violated Board Policy. Subsequently, five of the seven members of the Board voted to terminate Petitioner's employment. Tr. Tr. 1893, 2012. The two that opposed termination merely disagreed as to the level of discipline. Tr. Tr. 2012.

No administrators were present for the Board's deliberations. Tr. Tr. 2012-13. Furthermore, race was never considered, or even mentioned, as part of the Board's deliberations. Tr. Tr. 1905, 1938, 1972-73.

3. Petitioner's reliance on the jury verdict in favor of Petitioner on her race claim is misleading, as the interrogatories addressed by the jury were inconsistent with the *Price Waterhouse* theory advanced by Petitioner.

4. The evidence at trial clearly reflects Petitioner's authorization or approval of the conduct in her classroom. District personnel testified that through her conduct, Petitioner "set a climate" for [the profanity and inappropriate behavior] to occur. Hrg. Tr. 103. "[T]eachers

give direction and set guidelines and the tone for classroom activity." It is undisputed that Petitioner did nothing "to discourage it." Hrg. Tr. 107.

To the contrary, Petitioner gave her "students tacit approval for this profanity at every stage of this production." Hrg. Tr. 229; *cf.* Tr. Tr. 1875 ("[I]f you allow [profanity in the classroom], you condone it, you can't allow it and say I'm allowing it but only because it happens to be this particular play."). Petitioner's own expert, James Nicholson, testified before the Board that "[Petitioner] had somehow directly or indirectly given [students] permission" to use profanity. Hrg. Tr. 322-33. Even though Mr. Nicholson viewed only ten minutes of the thirty-eight minute videotapes of the student performances, he indicated that he had never seen more profanity in a public school setting than he witnessed in those videotapes. Hrg. Tr. 320, 323.

5. The relevance of t' -vents depicted in the videotapes to the lives of Petitioner s students is entirely irrelevant to the issues in this case. Notwithstanding Petitioner's efforts to redirect the Court's attention, the only matter before this Court is whether Supreme Court Rule 10 compels this Court's review of the Eighth Circuit's adjudication of Petitioner's claims.

6. Petitioner continually alleges "numerous instances" in which the District tolerated *similar* occurrences of student use of profanity in other student plays and writings. These allegations are entirely unsupported by the record before the Court. Contrary to Petitioner's assertion, the use of profanity and other inappropriate

behavior reflected in the evidence in this case is so pervasive, flagrant and reprehensible as to be beyond comparison to any other student-conducted presentations at the District.

7. Petitioner erroneously suggests that Vernon Mitchell, the principal of Berkeley High School, initiated the disciplinary proceedings against Petitioner. Contrary to Petitioner's assertion, the District's Superintendent of Schools, Robert Fritz, Caucasian, initiated the proceedings against Petitioner when he formally charged Petitioner with willful or persistent violation of the published regulations of the Board of Education. App. 613-615; Tr. Exh. C. Petitioner has never alleged any racial bias on the part of Dr. Fritz.

8. Although Petitioner testified that, on prior occasions, she disciplined students for using profanity, Tr. Tr. 452, 1037, there is no evidence to support Petitioner's contention that such efforts rise to the level of "diligent enforcement" of Board Policy. Furthermore, as recognized by the Eighth Circuit, nothing in the Policy that Petitioner professes she diligently enforced creates the exception for profanity in the context of student work contemplated by Petitioner.

In addition to the extreme profanity found in the videotapes, which Petitioner concedes (Hrg. Tr. 551), other student works, also written under Petitioner's supervision, contain similar, extreme profanity. *See* Hrg. Exh. 7; Hrg. Tr. 76-77; Tr. Exhs. H & I. Petitioner's own expert, Karen Price, characterized the first of these poems as a list of obscene words. Tr. Tr. 977. Price concedes the great range of profanity present in the student works and

the videotapes and admitted that she would not have permitted the poems and plays to be read aloud in class. Tr. Tr. 978.

Another of Petitioner's experts, Kathryn Nelson, concedes that the use of such profanity was entirely unnecessary, as creative writing can be taught as effectively without permitting such profanity. Tr. Tr. 1078. Similar to Price, Nelson characterized the language depicted in the poems and the videotapes as "extreme and disgusting." Tr. Tr. 1077. Further, Nelson testified that this is "not the kind of things [sic] that any of us want our children to do." Tr. Tr. 1078.

Consistent with Ms. Nelson's view, Dr. Davis, the District's Assistant Superintendent of Curriculum, saw no "educational significance" to the exercise depicted in the videotapes. Hrg. Tr. 798. By Petitioner's very action and/or inaction, her students "were also told to use profanity." Hrg. Tr. 157-58. Ultimately, "the extreme amount of profanity, and obscenities and vulgarities" led to the Board's decision to terminate Petitioner's employment. Hrg. Tr. 763.

9. The record lacks any evidence that Petitioner's selected teaching method ever previously elicited the level of vulgar, gratuitous profanity present in this record. Furthermore, Petitioner's own experts, proffered to address the propriety of Petitioner's teaching method, testified as to the *impropriety* of the conduct depicted in the student works at issue. *See* Infra.

10. Petitioner's reliance on Vernon Mitchell's statement regarding "black students acting a fool" in the

videotapes is misplaced.[2] Even assuming *arguendo* that Mr. Mitchell made this statement, it does not qualify as "direct evidence" of discrimination, as Mr. Mitchell is not a decision-maker and did not refer to *Petitioner's* race. Given the alleged context of the statement – that it was made to one of Petitioner's students in the course of Mitchell's inquiries about the videotaped performances (Tr. Tr. 1392) – the statement is not *any* evidence of race discrimination, let alone *direct* evidence. Further, the statement fails to create any inference in support of Petitioner's prima facie case of discrimination.

11. The District's inquiry focused on the videotapes of the student plays and copies of written work prepared by Petitioner's students. Further, the District considered only whether Petitioner's conduct violated the Board's Policy against profanity. The Board found that Petitioner committed a willful and persistent violation of Board Policy by permitting, if not promoting, the conduct depicted in the videotapes and the poems. *See, e.g.*, Tr. Tr. 2015. In fact, the Board believed that the violation was "sort of obvious." Tr. Tr. 2015. Similarly, the Superintendent's Cabinet[3] did not express "any doubt that what [Petitioner] had done clearly violated Board policy." Hrg. Tr. 810-11.

12. Contrary to Petitioner's contention, Respondent is not obligated to prove that Petitioner knew that the Board Policy applied specifically to profanity used by her

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[2] None of the witnesses could recall the exact statement allegedly made. *See, e.g.*, Tr. at 711, 1269, 1392.

[3] The Cabinet consists of seven people, only one of which is African-American. Tr. Tr. at 1578.

students in the context of a creative writing exercise. Such specificity is specifically precluded by *Bethel School District v. Fraser*, 478 U.S. 675 (1986) and its progeny.

C. Proceedings in the Eighth Circuit

With respect to Petitioner's First Amendment claim, the Eighth Circuit assumed, without deciding, the existence of a "notice requirement" under the First Amendment. Assuming the existence of such a requirement, the Eighth Circuit properly found that Respondent's Policy against profanity afforded Petitioner that level of notice to which she may have been entitled.

The evidence in this case is clear. Petitioner knew that Board Policy prohibited the use of profanity. In fact, Petitioner previously disciplined students for the use of profanity. Nevertheless, Petitioner erroneously claims that the Board's Policy against the use of profanity contravenes her First Amendment rights because it does not specify each and every context in which the Board's clear prohibition applies. There is simply no authority to support the imposition of such a strict notice obligation. Rather, the Eighth Circuit decision is entirely consistent with this Court's precedent and, thus, denial of the instant Petition is entirely appropriate.

Similarly, with respect to Petitioner's race claim, it is undisputed that the two allegedly biased administrators did not play any role in the Board's deliberation or ultimate decision to terminate Petitioner's employment. Rather an independent, admittedly unbiased, Board heard over five nights of testimony from Petitioner and fourteen other witnesses and, on its own, concluded that

it was "obvious" that Petitioner violated the Board's Policy. Based on that finding, the Board voted to terminate Petitioner's employment. In the absence of *any* evidence that an allegedly racially biased supervisor *actually tainted* the Board's decision, the Eighth Circuit's decision is entirely consistent with legion of authority in this area and denial of the instant Petition is compelled.

D. Dissent from Denial of Rehearing

Contrary to the implication of Petitioner's Brief, only Judge McMillian submitted a dissenting opinion. While Judge Morris Arnold dissented from the denial of the Petition for Rehearing, he declined to submit an opinion or to join in Judge McMillian's opinion. Moreover, Judge McMillian dissented from the denial of the Petition for Rehearing *only* with respect to Petitioner's First Amendment claim. Judge McMillian makes no reference to the disposition of Petitioner's race discrimination claims.

Specifically with respect to Petitioner's First Amendment claims, Judge McMillian contends that Petitioner was entitled to a more specific level of notice before she could be terminated for failing to comply with Board Policy. Judge McMillian argues that Petitioner should have received notice that the Board's blanket policy against the use of profanity specifically applied to student use of profanity in the context of written assignments. Respondent respectfully suggests that mandating such a heightened degree of specificity is impractical and unduly burdensome upon the schools charged with the responsibility to create and enforce these policies for the protection of our children.

This Court's precedent specifically recognizes that school board policies and regulations need not be as specific as a criminal code.

REASONS FOR DENIAL OF THE WRIT

A. First Amendment Claim

The circuits are in agreement as to the proper disposition of this case. At issue is whether, under the guise of the First Amendment, Petitioner is permitted to dictate school policy, alter the school's curriculum and permit the persistent, flagrant and unredeeming use of profanity by those students entrusted to the District to obtain an education.[4] The Eighth Circuit properly answered this question in the negative and directed the entry of judgment in favor of Respondent. To conclude otherwise would constitute a significant departure from legion of authority. Rather, the Eighth Circuit properly concluded,

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[4] As an initial matter, Respondent respectfully suggests that Petitioner cannot even demonstrate restriction of *her* speech, much less that any such profane speech is protected, especially in the context of a secondary school setting. Protection of obscenity has been consistently rejected as "utterly without redeeming social importance." *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

Consequently, "[o]bscenity may be wholly prohibited" without fear of contravening the First Amendment. *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978). Certainly there can be no serious debate that phrases such as "suck my dick" (*see* Tr. Exh. I) are lewd, as well as inconsistent with the District's social and moral obligations. *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

consistent with the overwhelming weight of authority, that Petitioner has no such right to abrogate the District's mission.[5]

Attempting to excuse her conduct, Petitioner ignores the issue of whether her speech is protected in the first instance. Instead, Petitioner reargues her contention that the Board's Policy prohibiting *all* profanity is somehow Constitutionally infirm because it fails to specify each and every context in which the Board's clear prohibition applies. However, the specificity sought by Petitioner is simply not compelled. *Cf. Fraser*, 478 U.S. at 668. Rather,

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[5] *See, e.g., Waters v. Churchill*, 511 U.S. at 674 (affording governmental entities greater latitude in restricting speech); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988) (recognizing District's interest in prohibiting student use of profanity); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986) (recognizing District's obligation to educate and convey social and moral values, which is inconsistent with condoning profanity); *Board of Educ. v. Pico*, 457 U.S. 853, 920 (1982) (severely restricting "Academic Freedom" in secondary school setting, notwithstanding First Amendment implications); *FCC v. Pacifica Found.*, 438 U.S. at 745 (stating that "[o]bscenity may be wholly prohibited" without fear of contravening the First Amendment); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969) (holding that inculcation of values is the "work of the schools" and restriction of speech is a valid means to that end); *Keyishian v. Board of Regents*, 385 U.S. 589, 602 (1967) (acknowledging the legitimacy of the state's interest in protecting its education system from subversion); *Chaplinsky*, 315 U.S. at 571-72 (rejecting First Amendment protection for obscenity as "utterly without redeeming social importance"); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 47 (1998) (expressly rejecting teacher's right to define curriculum notwithstanding the First Amendment).

Petitioner's implication that the Board's Policy is so vague as to provide inadequate notice that her speech might result in discipline raises *only* a due process question. *See, e.g., Fraser*, 478 U.S. at 686; *Wolfel v. Morris*, 872 F.2d 712, 717 (6th Cir. 1992) (cited by Petitioner and stating that "*due process* prohibits excessively vague laws.").

Moreover, in light of the fact that the District Court granted summary judgment in favor of Respondent on Petitioner's due process claim, the only portion of the judgment *never challenged* by Petitioner, Petitioner cannot credibly argue a denial of due process at this stage.

Adoption of such a high level of scrutiny for a school board policy as applies to a criminal code is directly contrary to the express mandate of this Court and would create precisely the inconsistency which Supreme Court Rule 10 seeks to avoid. *See, e.g., Fraser*, 478 U.S. at 686.[6] Such a result would have the opposite, inappropriate affect of creating new law both in the Eighth Circuit and arguably every circuit.

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[6] The vast majority of authority expressly rejects a teacher's interest in redefining the curriculum under the guise of the First Amendment. *See, e.g., Drambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995) (refusing to treat teaching method as protected speech); *Silano v. Sag Harbor Union Free Sch. Dist.*, 42 F.3d 719, 723 (2nd Cir. 1994) ("ultimate authority to determine 'what manner of speech in the classroom . . . is appropriate properly rests with the school board . . . .' "); *Hetrick v. Martin*, 480 F.2d 705, 708 (6th Cir. 1973) (denying teacher's First Amendment right to advance pedagogical attitudes inconsistent with those of the school); *Brooks v. School Dist.*, 267 F.2d 733, 739 (8th Cir. 1959) (declaring as beyond reproach district's right to define curriculum).

Petitioner cannot identify a single case, *arising in the secondary school context*, in which a teacher prevailed on an unlawful termination claim based on the alleged inadequacies of a school board promulgated policy. Petitioner's reliance on *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967), quoting *Speiser v. Randall*, 357 U.S. 513 (1958) and *Ward v. Hickey*, 996 F.2d 448, 453-54 (1st Cir. 1993), in support of the existence of a First Amendment "notice" requirement, is unavailing. *Keyishian* is simply inapplicable, as that case involved the propriety of the application of a *statute*, as opposed to a board policy.[7]

Further, *Keyishian* simply does not support Petitioner's asserted entitlement to the level of "notice" she demands in connection with the enforcement of the Board's anti-profanity policy. Consistent with prevailing authority, even if such a notice requirement exists, the policy at issue satisfies any such notice requirement.[8] There is simply no authority that might support the level of specificity of notice to which Petitioner alleges she is entitled. To conclude otherwise would constitute a significant departure from precedent of this Court.[9]

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[7] In addition, *Keyishian* arises in the college context, as opposed to the secondary school context. In the latter setting, greater limitations on speech are necessarily compelled under certain circumstances. *Cf. Fraser*, 478 U.S. 686.

[8] The analysis in *Keyishian* focuses on the "[p]recision of regulation," with the level of precision required to survive Constitutional scrutiny increasing as the nature of the freedom restrained becomes more precious. *Keyishian*, 385 U.S. at 604.

[9] In *Keyishian*, the Supreme Court arguably did not question the existence of a First Amendment right but rather

Petitioner's reliance on authority from the United States Court of Appeals for the First Circuit is similarly unavailing. *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), cited by Petitioner as supporting the existence of a First Amendment notice requirement, is distinguishable in several respects. Specifically, in *Keefe*, the court considered a state *statute*. There is no such *statute* at issue in this case.

Moreover, *assuming* the existence of a notice requirement,[10] the Eighth Circuit properly concluded that, in this case, the level of profanity exceeded any acceptable "degree," thus making unreasonable any professed belief by Petitioner as to the acceptability of the conduct occurring in her classroom. The Eighth Circuit's conclusion is entirely consistent with the First Circuit's opinion in

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considered, *in the context of a due process analysis*, whether the *statute* at issue was so vague as to preclude "notice" of a limitation of speech. Finally, in support of the District's position, in *Keyishian*, the Supreme Court specifically recognized the "legitimacy of [the State's] interest in protecting its education system from subversion." *Keyishian*, 385 U.S. at 602. Furthermore, Petitioner's reliance on *Speiser*, quoted by the Court in *Keyishian*, is equally unpersuasive, as *Speiser* involved the imposition of *criminal* sanctions for the exercise of certain speech. *Speiser*, 357 U.S. at 525-26. Such facts have no relevance here, as the parties agree that Board policy is not subject to the same level of scrutiny applicable to a criminal statute. Further, the language from *Keyishian* relied upon by Petitioner and set forth in *Speiser* arises in the context of a discussion regarding *due process* requirements, as opposed to First Amendment requirements.

[10] Although Petitioner raises the issue of a First Amendment Notice requirement in her petition, the Eighth Circuit never specifically addresses this issue.

Keefe, which also viewed restrictions on speech as a question "of degree." *See Keefe*, 418 F.2d at 362.[11]

Petitioner's reliance on *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971), is also detrimental to her argument. In *Mailloux*, the First Circuit recognized that "free speech does not grant teachers a license to say or write in class whatever they may feel like. . . . " *Id.* at 1243. Only through the application of a *case-by-case analysis* can a court ascertain the legitimacy of the interest of the authorities [in] circumscrib[ing] a teacher's speech." *Id.* Consequently, the First Circuit opinion in *Mailloux* promulgates precisely that portion of the Constitutional analysis ignored by Petitioner, to wit: the legitimacy of Respondent's interest in restricting the speech at issue as a measure of the protected nature of Petitioner's speech.

The practical, case-by-case approach advocated by the First Circuit in *Mailloux* is entirely consistent with the Eighth Circuit decision at issue. In a dissenting opinion filed in *Kramer v. Logan County School District No. R-1*, 157 F.3d 620 (8th Cir. 1998), Judge Richard Arnold, the author of the panel decision filed below, describes the analysis in *Lacks* as "fact-specific." Further, consistent with both the panel that considered this case below and the School Board, Judge Arnold concluded that Petitioner's conduct was "egregious" and "obviously" violated Board Policy. *Id.* at 627.

Finally, *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), also cited by Petitioner, is no more persuasive than the

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[11] Moreover, in *Keefe*, the First Circuit specifically declined to "place our decision on this [notice] ground alone." *Id.*

other First Circuit authority cited by Petitioner. Similar to much of the other authority cited by Petitioner in support of her Petition on the First Amendment issue, *Ward* specifically contemplates the existence of protected speech. *Id.* at 452. However, Petitioner fails to address the absence of such protected speech in this case.

Furthermore, in *Ward*, the First Circuit expressly does "*not* hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers." *Id.* at 454 (emphasis added). Rather, identical to the Eighth Circuit analysis, courts must consider whether, "based on existing regulations [and] policies, it was reasonable for the school to expect the teacher to know that her conduct was prohibited?" The Eighth Circuit properly resolved this inquiry in favor of the Respondent. Such a result is consistent with the analysis set forth in *Ward* and every other circuit that has considered this issue. Further, there is no basis to compel the exercise of this Court's oversight power.

Based on the foregoing, it is clear that Petitioner's effort to carve out a "creative writing" exception to the Board's anti-profanity policy is unavailing. First, Petitioner's argument raises *only* a due process question already resolved against Petitioner and never challenged. Second, the result proffered by Petitioner is directly *contrary* to legion of authority, which specifically do *not compel* school board policies to be as specific as a criminal statute. *See, e.g., Kuhlmeier*, 484 U.S. at 273; *Fraser*, 478 U.S. at 686; *Ward*, 996 F.2d at 454.

B. Race Claim

Petitioner erroneously contends that the Eighth Circuit's decision in this case is contrary to authority from other circuits, thus compelling this Court to intervene to resolve the alleged conflict.

Notwithstanding Petitioner's assertions, the Eighth Circuit decision is based on the complete absence of any direct evidence of discrimination, as required under the *Price Waterhouse* analysis Petitioner pursued. *See generally, Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).[12] Specifically, given the framework selected by Petitioner, she was obligated to offer *direct* evidence that *her termination* was motivated by her race. She does not, nor can she, offer such evidence. In fact, the evidence, as summarized below, is directly to the contrary. The Board conducted its own, independent analysis, found that Petitioner violated the Board's Policy, and, based on that violation, elected to terminate her employment.

In an effort to circumvent this fatal shortcoming, Petitioner again argues that racially biased administrators tainted the termination process. Petitioner's arguments in support of this Petition are identical to those raised below and merely request this Court to reconsider the prior decisions in this case. Rule 10 is not the proper vehicle for such "reconsideration."

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[12] To the extent that the Panel concluded that Petitioner violated explicit Board policy, even if there were direct evidence of discrimination, which there is not, the Board satisfied its burden of demonstrating that it would have terminated her employment notwithstanding any consideration of race. *Cf. Price Waterhouse*, 490 U.S. at 251.

Even if Petitioner's allegations regarding racial bias on the part of the District's administrators were true, which they are not, the allegedly biased administrators did not participate in the Board's deliberations regarding the termination of Petitioner's employment. The record reflects a complete absence of any reliance on or reference to the views of either allegedly biased administrator. Absent such a causal link, Petitioner's reliance on the "cat's paw" theory is unavailing.

The Eighth Circuit's application of the "cat's paw" analysis is consistent with the seminal "cat's paw" case, *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990).[13] In *Shager*, the Seventh Circuit specifically *declined* to hold employers liable for every allegedly discriminatory act committed by employees in the workplace. *Id.* at 405. Rather, the Seventh Circuit required a *direct relationship* between the allegedly discriminatory conduct and the employer's adverse employment decision. *Id.* (requiring deference "to the judgment of the man on the spot" making the decision-maker "the conduit of [a supervisor's] prejudice – his cat's paw" before finding employer liability).

Similarly, precedent applying the "cat's paw" theory universally requires a "causal link" between the conduct

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[13] Consistent with its holding in this case, on other occasions where the Eighth Circuit applied the "cat's paw" analysis, the Eighth Circuit required, as a prerequisite to liability, a showing that the racial animus of the "man on the spot" *actually impacted* the ultimate adverse employment decision. *See Jiles v. Ingram*, 944 F.2d 409, 411 (8th Cir. 1991) and *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1057 (8th Cir. 1993).

of the allegedly biased supervisor and the ultimate decision to terminate an employee's employment. *See, e.g., Long v. Eastfield College*, 88 F.3d 300, 306 (5th Cir. 1996). Consequently, where the ultimate adverse employment decision is not tainted by or reflective of the alleged racial bias of a supervisor, no liability lies under the "cat's paw" analysis. The conclusion reached by the Eighth Circuit in this case is entirely consistent with the conclusion reached by every other circuit that has applied the "cat's paw" analysis.

Further, even if the allegedly biased administrators participated in the disciplinary process, which they did not, any alleged causal link between the alleged bias of Petitioner's supervisors and the Board's ultimate decision is broken by the Board's independent action. The Board viewed videotapes of work performed in Petitioner's classroom, under her auspices. The unchallenged evidence establishes that, based *solely* on that tape, which depicted an *"obvious"* violation of Board Policy, the Board terminated Petitioner's employment. Petitioner has not demonstrated, nor can she demonstrate, that the allegedly biased supervisors made any recommendation to the Board or impacted the Board's ultimate decision in any way. As the Eighth Circuit properly concluded, the absence of such evidence is fatal to Petitioner's discrimination claim, *see, e.g., Wilson v. Stroh Co., Inc.*, 952 F.2d 942, 945-46 (6th Cir. 1992), and a grant of Certiorari on this point is inappropriate.

Nevertheless, Petitioner also cites *Burlington Industries, Inc. v. Ellerth*, No. 97-569, 1998 U.S. LEXIS 4217 (June 26, 1998) in support of her race argument. However, *Burlington* is inapposite to this case, as that case involved

overt sexual harassment by a supervisor, who *specifically and directly participated* in creating the hostile work environment that ultimately lead to plaintiff's constructive discharge. No such causal link exists here.

Furthermore, contrary to the facts presented in *Burlington*, in this case there is no evidence that Petitioner was subjected to a racially hostile environment. Rather, the Board terminated Petitioner based on the conduct of Petitioner's students in Petitioner's classroom, created under her auspices. By Petitioner's own admission, the alleged racially biased supervisors played no role in the Board's termination of Petitioner's employment. Finally, *Burlington* involved a private employer, not entitled to the same level of deference afforded school boards in the administration of staffing and curriculum issues. *See, e.g., Hudson v. Wellston Sch. Dist.*, 796 S.W.2d 31, 33 (Mo. Ct. App. 1990).

Contrary to Petitioner's assertion, numerous courts have *not* "simply assumed" that an employer is liable for race discrimination because of a supervisor's racial bias, notwithstanding the good faith investigation by a non-biased decision-maker. Rather, in every case cited by Petitioner, the allegedly biased individual somehow impacted the investigation conducted by the "unbiased" entity.

For example, in *Simpson v. Diversitech*, 945 F.2d 156 (6th Cir. 1991), a case cited by Petitioner, the employee allegedly discriminated against was terminated after three disciplinary incidents. The discharge imposed by the unbiased investigator resulted from the employee's accumulation of three prior discipline reports. However,

unlike the case at bar, in *Simpson*, the allegedly biased supervisor submitted one of the three discipline reports relied upon by the unbiased decision-maker. Therefore, in *Simpson*, the allegedly biased supervisor "tainted" the otherwise unbiased decision-making process. No such facts exist in this case.

Similarly, in *Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C. Cir. 1998), another case cited by Petitioner, the allegedly biased supervisor impacted the decision-making process. Specifically, the appellate court found that the allegedly biased supervisor "was in fact an integral part of the decision-making process." *Id.* at 1311.

Moreover, the District of Columbia Court of Appeals specifically recognized, consistent with the Eighth Circuit's decision in this case and consistent with the Seventh Circuit's decision in *Willis v. Marion County Auditor's Office*, 118 F.3d 542 (7th Cir. 1998), that:

> [W]hen the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and legally permissive [sic] basis, the bias of the subordinate is not relevant.

Willis, 118 F.3d at 547. These are the precise facts of this case. The evidence in this case demonstrates the Board's reliance on the videotapes of Petitioner's students as reflecting Petitioner's breach of the Board's policy and thus the basis for terminating Petitioner's employment.

Finally, Petitioner cites *Roebuck v. Drexel University*, 852 F.2d 715 (3rd Cir. 1988) in support of her "cat's paw" argument. This case is equally inapposite, as it involves

reliance by the ultimate decision-maker on information derived from the allegedly biased supervisor. The evidence in *Roebuck* indicated that the unbiased decision-maker "had available *and considered* the reports and recommendations of each previous evaluator," including the allegedly biased evaluator. *Id.* at 727 (emphasis added). In contrast, the unchallenged evidence in this case demonstrates that the Board did not rely on, defer to, or in any other way base its ultimate decision to terminate Petitioner's employment on anything submitted by either of the allegedly biased administrators.

CONCLUSION

Petitioner fails to establish any basis for granting the instant Petition. This case does not present a situation in which a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals. Furthermore, this case is not one in which a court has so far departed from the accepted and usual course of judicial precedent as to compel the exercise of this Court's supervisory authority.

Rather, the Eighth Circuit's opinion in this case is entirely consistent with precedent of this Court and opinions of other circuits. *Cf. Fraser*, 478 U.S. at 681.

Based on the foregoing, Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS A. MICKES
Counsel of Record

MELANIE GURLEY KEENEY
RICHARD H. KUHLMAN
BLACKWELL SANDERS PEPER MARTIN LLP
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
(314) 345-6000

Counsel For Respondent

MOTION FILED
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No. 98-983

CECELIA LACKS,

Petitioner

v.

FERGUSON-FLORISSANT REORGANIZED SCHOOL DISTRICT, R-2

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

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Motion by Pen American Center , The American Association of University Women, the American Booksellers Foundation for Free Expression, American Society of Journalists and Authors, The Authors Guild, Feminists for Free Expression, The Institute for First Amendment Studies, Journalism Education Association, The National Campaign for Freedom of Expression, The National Council of Teachers of English, the National Coalition Against Censorship, the National Education Association, the National Writers Union, and Young Playwrights, Inc. for Leave to File Brief *Amici Curiae* In Support of Petition for Certiorari with Brief Attached

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LEON FRIEDMAN
148 East 78TH Street
New York, N.Y. 10021
(212) 737-0400
Attorney for *Amici*

21pp

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Pen American Center ("PEN"), The American Association of University Women, ("AAUW"), the American Booksellers Foundation for Free Expression ("ABFFE") American Society of Journalists and Authors, The Authors Guild, Feminists for Free Expression (FFE), The Institute for First Amendment Studies (IFAS), Journalism Education Association (JEA), The National Campaign for Freedom of Expression, The National Council of Teachers of English, the National Coalition Against Censorship, the National Education Association, the National Writers Union, and Young Playwrights, Inc. the, hereby move, pursuant to Rule 37.2, for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Petitioner has consented to the filing of this brief, but Respondent has declined to consent to this brief. A copy of the proposed *amici* brief is attached. [1]

As noted in the various "Statements of Interest" of the *Amici* listed above, all of the groups have as their mission the protection of First Amendment rights in the educational and creative process. While they agree that important First Amendment due process rights are implicated by the decision below, as explained in the Petition for Certiorari, they are concerned that the decision of the Eighth Circuit will have a broader chilling and detrimental effect on the exercise of First Amendment

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[1] In response to a request for consent by Respondent to the filing of this brief, Respondent's counsel stated that he "was not aware of any relevant matter that has not already been brought to the Court's attention."

rights by teachers and students in the educational process. We believe that the presentation of that point of view will be of considerable help to the Court.

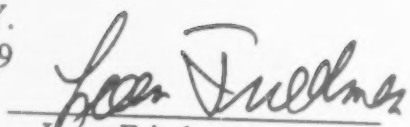
This case is important to teachers throughout the country. Teachers should not have to be concerned about job security when they follow an approved curriculum and when they follow established and accepted methods to promote discussion and learning and their students' exploration and expression of ideas. The First Amendment rights of teachers should not be censored in the classroom, except when necessary to achieve legitimate educational goals and then only when adequate notice has been afforded. This is especially true if the teachers have acted in a responsible manner. Furthermore teachers should have the right to use innovative methods proven to help their students learn, as long as the methods are within the approved curriculum of the district.

The decision below promises to create serious confusion and even alarm and dismay among educators around the country, who must guard now what they say and teach. This Court should review the obviously flawed decision of the Eighth Circuit below, because it raises issues of great import to the governance of the public education system, and because of the need for greater uniformity and predictability in the implementation of important constitutional principles.

It is hereby requested that the Court grant leave to file the attached brief of the *Amici* listed above.

Respectfully submitted,

Dated: New York, N.Y.
February 3, 1999



Leon Friedman
148 East 78th Street
New York, N.Y. 10021
(212) 737-0400
Attorney for Amici

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INTEREST OF *AMICI CURIAE* [1]

Amici are public interest organizations who have as their mission the protection of First Amendment rights in the educational and creative process. They believe that the decision below has serious implications for the exercise of First Amendment rights of students and teachers in the public school context. The decision tells teachers that it is dangerous to use books or teaching techniques that some group might find offensive or controversial, because that might put the teacher's job and career at risk. Teachers will shy away from such materials and avoid innovative teaching methods that would help their students express themselves and explore new ideas.

The case does not present the question of whether teachers have a First Amendment right to use profanity in the classroom or permit students to do so. Rather the case presents the issue of whether it is constitutionally permissible to make a teacher a scapegoat or fire her for using a particular teaching technique that she had used for years, without first putting her on notice that use of that method is no longer permitted.

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[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amici curiae*, its members, or counsel, have made a monetary contribution to the preparation or submission of the brief.

REASONS FOR GRANTING THE WRIT

THE ACTIONS OF THE SCHOOL BOARD TERMINATING PETITIONER FROM HER TEACHING POSITION CONSTITUTED A SERIOUS VIOLATION OF THE FIRST AMENDMENT AND THE DECISION BELOW UPHOLDING THAT TERMINATION WILL HAVE SERIOUS REPERCUSSIONS ON THE CONSTITUTIONAL RIGHTS OF TEACHERS THROUGHOUT THE COUNTRY

Introduction

This case lies at the intersection of a number of serious and difficult legal, pedagogical and political currents in public education today. [2]

First is the right of students, protected under the First Amendment, to express themselves in a school setting and to obtain access to ideas, books and other teaching materials, albeit in a more limited manner than in a full public forum.

Second is the right of teachers, also protected by the Constitution, to foster and encourage their students' intellectual development by innovative educational methods within approved limits of the curriculum and to be afforded a reasonable amount of "breathing room" in

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[2] The Lacks case has been the subject of considerable discussion and debate around the country. See e.g., "Hey Teacher, Watch What You Say," Boston Globe, September 13, 1998; "Free Speech in the Classroom," American Lawyer, August 17, 1998, p. 31; "Firing of Cissy Lacks Was Disruptive," St. Louis Post-Dispatch, July 24, 1998, p. B6.

the classroom to promote discussion, learning and the exploration of ideas.

Third is the duty of school boards and administrators to enforce proper codes of conduct upon both students and teachers and to insure that the educational system is not disrupted by language and actions that would be unruly and distracting to the schools' educational mission.

Fourth is the growing influence of political and ideological considerations unrelated to the educational mission of the schools by parents, voters, and interest groups seeking to effect how teachers and school boards establish and implement the curriculum.

Fifth, and the one directly involved in this case, is the need to insure that whatever rules are established to accommodate the conflicting currents noted above, they afford clear warning and notice so that teachers and students are clearly informed about school policy and forewarned about any serious consequences that may ensue from transgression of those rules.

In this case, all of the currents collided. Petitioner Lacks, a distinguished, prize-winning teacher with more than twenty years experience, gave an approved assignment to her 11th grade English class. In accordance with a creative teaching method officially recommended and followed within the district — an approach Lacks had used successfully for years with no complaints -- students prepared plays in which they used dialogue natural to the characters they created. [3] The students' recitation of the plays in class was videotaped so that the students would observe themselves speak and, in this way, improve their oral presentation skills. The dialogue of the characters

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[3] The theory behind these exercises was to allow students to use their own experiences as a basis for their writing and thus to open up the creative process.

within some of the plays contained profanity and racial slang, as was appropriate to the actions of the characters within the play.

It was established at trial that other teachers in the district had used the same method in the past, other students' creative writing contained profanity and at least one play containing profanity had not only been read aloud in class but performed at a school-sponsored, public function. No disciplinary action had previously been taken against either the students or the teachers involved.

Here, however, the school principal took umbrage at the videotape of black students using profanity in the dialogue of the characters they created. The principal told another student that he was offended by the drama exercise since it constituted an example of "black students acting a fool and white folks videotaping it." Tr. 1392. Disciplinary action was instituted against petitioner Lacks for failing to enforce the Student Discipline Code, particularly the requirement that students not use "profanity." Despite her outstanding record, [4] despite the fact that no other teacher had ever been sanctioned for engaging in similar academic exercises and despite the fact that no disciplinary action was taken against the students who actually recited the profanity, Petitioner

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[4] Lacks' success in using this technique to reach hard-to-teach students is reflected in a letter from one of her former students, written after he learned that she had been fired: ". . . there is no way for us to just put our harsh reality or our violent and cruel society in our lockers till after school . . [When] a student walks in your classroom, you have no idea what he or she has gone through before that moment. And in an assignment if a student uses a profane word to explain their situation is it ignorance or an outcry? .... .Few people care enough to look past the hard shell.' " Quoted in Censorship News, #72 (Winter 1998-99). P. 1 Poems introduced at Lacks' administrative hearing demonstrated, according to one observer, "how her students moved from vulgarity to eloquence," Kornbluth, "Class Notes," The New York Times, April 24, 1996.

Lacks was terminated from employment by the Ferguson-Florissant Reorganized School District.

Following her termination, petitioner Lacks brought this action, claiming that her First Amendment rights had been violated since she did not receive fair notice that her conduct was covered by the provision under which she was terminated. A jury found in her favor, answering "no" to the interrogatory asking whether she had received fair notice that the anti-profanity provision applied to creative writing exercises. The Eighth Circuit reversed, holding that as a matter of law, the answer to that question was "yes".

A. The Legal and Educational Background

1. Extensive Confusion Exists as to the Governing Rules Relating to Teacher Use of Allegedly "Controversial" Materials

Lacks' case is neither atypical, nor an isolated incident. Teachers and administrators in many jurisdictions around the country are unclear about the rules governing "controversial" materials and about the latitude that students and teachers have in the give-and-take of classroom discussion. The lower federal courts and state courts are presented with these disputes regularly but have failed to provide a consistent or coherent analysis of these situations to guide educators.

For example, in New York City in December, 1998, a teacher was forced to seek a transfer from her public school because some parents objected to her use of a book entitled "Nappy Hair" in the classroom, despite the fact that the book was written by a leading black scholar who was seeking to create positive feelings in black students about kinky hair. See "Fallout from 'Nappy Hair' Furor," New York Times, December 11, 1998, p. A34.

That situation has not, so far, resulted in litigation, unlike a situation in Florida where a teacher brought suit after she was prohibited from using Kenneth Starr's grand jury report in class. See "Teacher Sues Over Starr Report Ban," Washington Post, December 6, 1998, p. A7. Likewise two teachers in Vaughn, New Mexico sued after they were suspended and then terminated for using a textbook and making certain comments that presented a negative view of the behavior of the Texas Rangers toward Mexicans. They were later paid over $500,000 in settlement of their suit against the school board. See "Fired Teachers Get $520,000," Albuquerque Tribune, November 19, 1998, p. A1 and A4. In North Carolina a high school teacher sued, alleging that her transfer to a middle school resulted in part from concerns about the content of a play which won second place in a statewide drama competition (the objections related to two characters in the play, one pregnant and unmarried, the other, a lesbian). See Boring v. Buncombe County Board of Education, 136 F.3d 364 (4th Cir. 1998)(en banc), cert. denied, 119 S.Ct. (1998). In another case in Tempe, Arizona, the school board prevailed against a parental challenge to inclusion of Mark Twain's "The Adventures of Huckleberry Finn," and William Faulkner's "A Rose for Emily" as part of the English curriculum in a freshman high school class. The parents objected to the books' use of racially derogatory epithets. See Montiero v. Tempe Union School District, 158 F.3d 1022 (9th Cir. 1998). In Colorado, a high school teacher was fired for showing to his English class the film "1900," directed by Bernardo Bertolucci, dealing with the rise of fascism, without obtaining the preclearance required for use of "controversial" materials. See Board of Education of

Jefferson County v. Wilder, 960 P.2d 695 (Colo. Sup. Ct. 1998). [5]

2. Legal Confusion Exists on the Proper Test to Be Applied, With the Result that Proper Notice Is Not Afforded to Teachers

One theme in the litigated cases is a tendency towards judicial deference to school administrators, following this Court's decision in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). Given that different administrators and districts will have different attitudes towards "controversial" materials, sometimes changing from year to year with turnover in personnel and elected officials, it is particularly critical that teachers receive clear notice of what is or is not permissible. Otherwise, teachers will exclude all but the blandest material for fear that error in judgment on their part will cost them their employment. At a minimum, to avoid a deadly chilling effect on the materials, ideas and educational content in the public school system and to insure that teachers' due process rights are protected, this Courts' guidance is needed to clarify that the rules must be well defined and applied prospectively.

The problem is compounded by the large number and wide range of materials that have been called "objectionable' or "controversial."

The American Library Association and the American Booksellers' Foundation for Free Expression (an amicus herein) sponsor a "National Banned Books

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[5] The frequency of such episodes may be a reflection of the increasing "politicization" of school curricula, with differing political interests groups wishing to insure that their point of view is presented in a classroom setting and that opposing points of view are eliminated.

Week" each year, highlighting the prominent works that have been challenged by parents and outside influence groups as inappropriate for school children. In October 1998, the Library Association reported that 600 books had been challenged over the past year by various parents and interests groups throughout the country, one of the highest number of challenges in recent years. Included among the challenged works were "The Adventures of Huckleberry Finn" (continuously attacked throughout the country because of the use of the word "nigger"); "I Know Why the Caged Bird Sings," (challenged in Ohio, Minnesota, Washington, California, North Carolina, Georgia and Maryland for sexual content and derogatory portrayal of white people); "Forever," by Judy Blume (challenged in Illinois); "The Client," "The Firm" and "The Pelican Brief," (removed from school libraries in Jackson County, W. Va.); "Death of a Salesman," (challenged for offensive language in Illinois); "Of Mice and Men," (challenged in Illinois, Ohio, Florida and Minnesota for offensive language). See "Books Under Debate," The Tennessean, November 30, 1998, p. 38.

In prior years, all of Stephen Kings' works were banned from a Jacksonville Florida, middle school library. "Don't Read This: Censorship of School Books" Scholastic Update, September 13, 1993, p. 15 (discussing other banned works such as "Catcher in the Rye" and "The Boy Who Lost His Face"). Among the other works challenged were Chaucer's "The Miller's Tale" from Canterbury Tales and Lysistrata (see Virgil v. School Board of Columbia County, Fla., 862 F.2d 1517 (11th Cir. 1989)). See also Pratt v. Independent School Dist. No. 831, Forest Lake, Minn., 670 F.2d 771 (8th Cir. 1982)(movie based on Shirley Jackson's "The Lottery" restored to junior high school and high school curriculum after removal by school board).

In many of these cases, the challenged books contained profane language, such as that involved in this case, yet the books were allowed to remain in the curriculum or school library, available to students, presumably because school officials concluded that their pedagogical and literary value outweighed concerns about language. Thus in the leading case of Board of Education, Island Trees Free School District v. Pico, 457 U.S. 853 (1982), this Court held that nine challenged books containing profane language could not be removed from the high school library on the basis of their ideological content, and a trial had to be held to determine the reason for their removal. Eventually, the books were restored to the library shelves of the schools involved. See "Banned Book Week: Right to Read vs. Right to Ban," Newsday, September 25, 1995, p. B16.

The nine books restored to the Island Trees school library contained many of the same words whose recitation by a student led to Petitioner Lacks' termination here. Thus The Fixer, by Bernard Malamud, contains the work "fuck" and "fucking"; Go Ask Alice, contains the words "shit," "piss" and "ass"; Slaughterhouse Five, contains the word "motherfucker"; Black Boy, by Richard Wright contains the word "nigger." See Pico v. Board of Education Island Trees Union Free School District, 628 F.2d 404, 421, fn. 1 (2d Cir. 1980)(Mansfield J., dissenting) reversed, 457 U.S. 853 (1982).

Presumably these books may be read by the students in Island Trees School District as well as in other schools around the country and may be assigned reading in many schools. Presumably, many or most of these schools also impose "no profanity" rules as part of the student code of conduct. Yet the decision of the Court below suggests that if a teacher asks students to read and comment on their favorite passage from those books in open class, and the student's chosen passage contains one

of those words, such recitation could lead to the dismissal of the teacher, on the ground that she did not enforce the student discipline code prohibiting "profanity."

Indeed that was precisely the position taken by one of the witnesses for the school board in this case. One of the administrators who made the decision to bring charges against Petitioner Lacks, Barbara Davis, stated that as she read the Student Discipline Code, it prohibited a student from reading aloud from an assigned book (such as those mentioned above) if it contained any profanity. Tr. 1700. Both the students reading the word and the teacher assigning the passage would be subject to discipline even if the book were lawfully within the assigned curriculum. Merely to state that proposition shows the hazards and perils of the decision below, and the chill it will likely have on assignments and classroom discussion.

B. Lack of Notice

This case does not require this Court to resolve the issue of what kinds of books may be properly assigned to students in class and under what circumstances school boards may restrict student access to works containing profane words. Nor is this Court being asked to decide whether students have a constitutional right to read aloud every word from an assigned book or whether teachers can be prohibited from allowing such recitation.

What the case does require is for this Court to insure that school policy about "controversial" speech and materials is set forth with sufficient detail and clarity to fairly inform teachers of conduct that could result in termination of employment and that school policy in this area must in fact be based on legitimate pedagogical considerations.

The problem may be illustrated by an earlier case from the First Circuit. Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969). In that case a high school teacher read an article to his senior high school class from the Atlantic Monthly dealing with the origin of the phrase "Up Against the Wall, Motherfucker." The teacher was fired for violating a school regulation requiring that "Teachers shall use all possible care in safeguarding the health and moral welfare of their pupils, discountenancing promptly: vandalism, falsehood, profanity, cruelty and other form of vice." 418 F.2d at 362, fn. 10 (emphasis added). The Court of Appeals found the article "scholarly, thoughtful and thought-provoking" and its use of the offending word was appropriate in context. The court posed the question as follows: " . . . whether a teacher may, for demonstrated educational purposes, quote a 'dirty' word currently used in order to give special offense, or whether the shock is too great for high school students to stand." 418 F.2d at 361. The court indicated that the regulation quoted above did not give proper notice that use of the word by a teacher as part of a proper educational lesson was prohibited. "We believe it equally probable that the plaintiff will prevail on the lack of any notice that a discussion of this article with the senior class was forbidden conduct." 418 F.3d at 362. The Court directed that an injunction issue blocking any disciplinary action against the teacher involved. See also Hosford v. School Committee of Sandwich, 421 Mass. 708, 659 N.E.2d 1178 (Ma. Sup. Jud. Ct. 1996)(teacher cannot be disciplined for engaging in brief pedagogical discussion of vulgar words in class).

If the anti-profanity provision quoted in the Keefe case did not give a teacher notice that actually reading an article with an offending word violated the student disciplinary code, then how could an almost identical provision give a teacher notice that she violated the same

type of code simply by allowing a student to read the word in a creative writing exercise?

This Court has established in many different contexts that the Constitution requires advanced notice of what is permissible or not permissible in the area of First Amendment rights. Indeed that is the very basis for the First Amendment overbreadth doctrine. See Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, 482 U.S. 569, 574 (1987)(law infringing First Amendment rights may be challenged by person whose own conduct not constitutionally protected "because it threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution . . .").

In Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967), this Court noted that teachers must be given advance notice of what expressive conduct may lead to sanctions against them. "The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed."

Justice Stevens noted in dissent in Bethel School District v. Fraser, 478 U.S. 675, 691-692 (1986)(Stevens, J. dissenting): " . . . if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation. The interest in free speech protected by the First Amendment and the interest in fair procedure protected by the Due Process Clause of the Fourteenth Amendment combine to require this conclusion."

A fortiori, a teacher punished because a student (for a creative writing assignment) created characters who use speech some would find offensive is entitled to such clear notice, particularly when the teacher was punished

far more severely than the student in Bethel -- termination as opposed to the student's three-day suspension.

The decision below promises to create serious confusion and even alarm and dismay among educators around the country, who must guard now what they say and teach. This Court must review the obviously flawed decision of the Eighth Circuit below, because it raises issues of great import to the governance of the public education system, and because of the need for greater uniformity and predictability in the implementation of important constitutional principles.

CONCLUSION

For the reasons stated above, the writ of certiorari should be granted.

Dated: New York, N.Y.
February 3, 1999

Leon Friedman
148 East 78th Street
New York, N.Y. 10021
(212) 737-0400
Attorney for Amici

APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

PEN AMERICAN CENTER

PEN American Center ("PEN") is an organization of 2,400 novelists, poets, essayists, translators, playwrights, and editors, chartered to defend free and open communication within all nations and across national boundaries. American PEN has taken a leading role in attacking restrictive laws, rules, regulations and practices that censor, curb, or limit freedom of speech or expression in the nation.

In 1996 it awarded Petitioner Cecilia Lacks the PEN/Newman's Own First Amendment award, sponsored by our organization and actor Paul Newman. The award was made to recognize her dedicated actions in preserving, protecting and advancing First Amendment rights in this nation. PEN believes that the legal fight at issue here has important implications for writers and teachers around the country since the decision below suggests that generalized student disciplinary codes can be used to censor and sanction teachers and writers who take no action themselves but simply allow their students to engage in protected expressive conduct.

AMERICAN ASSOCIATION OF UNIVERSITY WOMAN

For well over a century, the American Association of University Women (AAUW), an organization of 150,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls, lifelong learning, and

positive societal change. AAUW plays a major role in activating advocates nationwide on AAUWs priority issues. Current priorities include gender equity in education, reproductive choice, workplace, and civil rights issues. AAUW vigorously resists any attempts, whether by special interest groups, branches of government, or other sources, to ban or censor books or other media.

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRSSION

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990 by the American Booksellers Association ("ABA"). With over 3,500 members doing business in 5,000 locations, ABA is the leading association of general interest bookstores in the United States. ABFEE's mission is to inform and educate booksellers, other members of the book industry and the public about the dangers of censorship and to promote the free expression of ideas, particularly freedom in the choice of reading materials.

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS

The American Society of Journalists and Authors is the national organization of leading independent non-fiction writers. Our 1000-plus members have a charter interest in the free and open exchange of ideas, information and opinions. We have a special concern that the books we write, both trade books and textbooks, be considered for the classroom on their merits rather than on unanticipated and irrational biases. Some of our members write specifically for a young audience, all of our members see today's children as tomorrow's readers

and possibly tomorrow's writers and prospective ASJA members.

THE AUTHORS GUILD

The Authors Guild, founded in 1912, is a national non-profit association of more than 7,700 professional, published writers of all genres. The Guild counts journalists, historians, biographers, and other writers of nonfiction and fiction as members. Guild members have won many awards, including the Pulitzer and Nobel Prizes, and National Book awards. Their works are valuable contributions to the creative and intellectual fabric of our society. The Authors Guild works to promote the professional interests of authors in various areas, including freedom of expression. The Authors Guild views this case, and all cases which threaten free expression, as bearing directly on the ability of authors to carry on their business of writing as a livelihood.

FEMINISTS FOR FREE EXPRESSION

Feminists for Free Expression (FFE) is a national, non-profit organization composed of a diverse group of feminist women and men, including educators, lawyers, writers, and scholars, all of whom share a commitment to both gender equality and freedom of expression. We believe that genuine feminism encourages individual intellectual and artistic growth, and that teachers who encourage students to express themselves in class without fear of reprisal or censorship are crucial to such growth. To punish such teachers because of the form in which student communication is expressed does not serve the interests of students, teachers, or indeed the nation.

THE INSTITUTE FOR FIRST AMENDMENT STUDIES

The Institute for First Amendment Studies (IFAS) is a non-profit education and research organization that focuses on the First Amendment. Among other things, IFAS carefully tracks church/state issues to identify situations in which organizations and/or individuals utilize the power of the state to impose their religious viewpoints upon others. Efforts to suppress free speech and censor materials in schools often derive from the desire to impose a particular religious perspective. In our view, academic freedom and free speech, essential freedoms in their own right, are also necessary to safeguard separation of church and state and freedom of religious expression.

JOURNALISM EDUCATION ASSOCIATION

The Journalism Education Association (JEA) represents more than 2,000 journalism teachers and publication advisers across the United States. It upholds the rights of students and teachers to exercise their freedom of expression as guaranteed by the First Amendment to the Constitution of the United States. JEA believes that teachers should empower students to make decisions in a learning atmosphere where students will actively practice critical thinking and decision making, and it believes students should seek out points of view and explore a variety of information sources in their decision making. In addition, JEA thinks students should have a free, robust and active forum for expression without prior review or restraint, and it thinks teachers should show trust in students by allowing them to learn in a caring environment. First Amendment rights of teachers should not be censored in the classroom, if the teachers

have acted in a responsible manner, Teachers should have the right to use innovative methods to help their students learn as long as the methods are within the approved curriculum of the district. This case is important to teachers throughout the country. Teachers should not be concerned about job security when they allow their students to practice their constitutional right of responsible freedom of expression.

NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION

The National Campaign for Freedom of Expression is a national, nonprofit organization comprised of artists, arts organizations, audience members, and concerned citizens dedicated to promoting First Amendment rights as applied to the support, creation, and presentation of arts in American culture. NCFE has litigated and filed amicus curiae briefs in several cases involving freedom of expression since its founding in 1990. On behalf of its supporters, NCFE has a broad interest in promoting the free speech rights of arts educators and arts students to be free from unreasonable administrative control over the content and viewpoint expressed in their works.

NATIONAL COUNCIL OF TEACHERS OF ENGLISH

The National Council of Teachers of English, a professional association of educators of English studies, literacy and language arts, is dedicated to improving the teaching and learning of English and the language arts at all levels of education. Its 80,000 members and subscribers worldwide are elementary, middle and high school teachers, supervisors of English programs, college

and university faculty, teacher educators, local and state agency English specialists, and professionals in related fields.

NATIONAL COALTION AGAINST CENSORSHIP

The National Coalition Against Censorship (NCAC) is an alliance of forty-eight national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups. United by a conviction that freedoms of thought, inquiry and expression are indispensable to a healthy democracy, they work to educate their members and the public about the dangers of censorship and how to oppose it. The positions advocated by NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

NATIONAL EDUCATION ASSOCIATION

The National Education Association (NEA) is a nationwide employee organization with approximately 2.4 million members, the vast majority of whom are teachers employed by public school districts colleges and universities. The constitutional issues at stake sharply and directly implicate the core interests of NEA and its members, for if the lower court's decision is allowed to stand, it will have a devastating and chilling effect on the ability of educators to use innovative and creative teaching techniques in the classroom. The NEA believes that this case does <u>not</u> present the question whether teachers have a First Amendment right to use profanity in the classroom or to permit students to do so. Rather the question presented is whether a school district can fire a veteran teacher for using a particular teaching method, a pedagogically-sound technique she has used successfully

for years, without first putting her on notice that use of that method is no longer permitted. [1]

NATIONAL WRITERS UNION

The National Writers Union is an affiliate of the United Auto Workers and the AFL-CIO. The NWU represents nearly 6,000 freelance writers, including journalists, book authors, poets, short-fiction writers, business and technical writers, academics, textbook and children's book authors, cartoonists, and workers in all genres. The NWU is committed to freedom of expression in all media.

YOUNG PLAYWRIGHTS

Young Playwrights, Inc. founded in 1981 by Stephen Sondheim and members of the Dramatists Guild, exists solely to nurture the artistic voices of America's youth through the art of playwriting. YPI's work is built on the belief that every young person has something important to say and the inherent right to be heard. It is imperative that student's constitution al right to free speech be not only protected but honored and encouraged. The same right to free expression should be afforded to educators charged with the development of America's future. Empowering the dedicated classroom teacher to employ innovative, pedagogically sound techniques in the classroom is essential to the cultivation of student's artistic growth. This case tests not only the educator's right to promote the free exchange of ideas but the acknowledgement of America's youth as protected and valued citizens.

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[1] Petitioner Lacks was a member of NEA at the time of the events in question. Her litigation is being financed under NEA's Unified Legal Services Program.

No. 98-983 (4)

In The

Supreme Court of the United States

October Term, 1998

CECLILIA LACKS,

Petitioner,

v.

FERGUSON-FLORISSANT REORGANIZED SCHOOL DISTRICT, R-2,

Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

THOMAS A. MICKES
Counsel of Record

MELLANIE GURLEY KEENEY
RICHARD H. KUHLMAN
BLACKWELL, SANDERS PEPER
MARTIN LLP
720 Olive Street 24th Floor
St. Louis, Missouri 63101
(314) 345-6000

Counsel for Respondent

5 pp

MEMORANDUM IN OPPOSITION TO
MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

This matter is before the Court on movants'[1] Motion to file an *amicus curiae* brief (hereinafter referred to as the "Brief") in support of the pending Petition for Writ of Certiorari, filed by Petitioner Cecilia Lacks in the above-captioned matter. To the extent the proffered Brief fails to comport with the applicable Supreme Court Rules, Respondent Ferguson-Florissant Reorganized School District, R-2 (the "District") objects to the filing of the Brief.

Supreme Court Rule 37, which governs the filing of an amicus curiae brief, specifically provides that:

> 1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

Clearly, a brief that merely reargues the same issues already addressed by the parties and relies on essentially the same authority cited by the parties already before the Court does not "bring[] to the attention of the Court relevant matter not already brought to its attention . . . ." Therefore, the filing of such a brief is "not favored."

In support of their Motion to file an *amicus curiae* brief, movants allege that their "mission" is the protection of First Amendment rights and that they are concerned about the "chilling and detrimental effect" of the Eighth Circuit's decision below. However, Petitioner Lacks already placed this "concern" squarely before this Court through her Petition for Writ of Certiorari. *See* Petitioner's Petition for Writ of Certiorari at pp. 21-22. Furthermore, the parties

[1] "Movants" refers collectively to Pen American Center; The American Association of University Woman; the American Booksellers Foundation for Free Expression; American Society of Journalists and Authors; The Authors Guild; Feminists for Free Expression; The Institute for First Amendment Studies; Journalism Education Association, The National Campaign for Freedom of Expression; The National Council of Teachers of English; the National Coalition Against Censorship; the National Education Association; the National Writers Union; and Young Playwrights, Inc.

extensively addressed this proffered "concern" before the Eighth Circuit. *See, e.g.*, Appellee Lacks' Brief, filed in the United States Court of Appeals for the Eighth Circuit, at pp. 42-43. Both the Eighth Circuit's panel decision and Judge McMillian's opinion dissenting from the denial of rehearing address this "concern" and are before this Court as appendices to the pending Petition for Writ of Certiorari. *See* Petition for Writ of Certiorari, pp. 11a & 35a.

Similarly, movants argue in support of their Motion to file an *amicus curiae* brief that censorship in the classroom can be permitted only where "necessary to achieve a legitimate educational goal." Neither party denies the truth of that statement. In fact, the District asserted the legitimacy of its interest in restricting speech in the secondary school classroom in support of its opposition to Lacks' Petition for Writ of Certioari. *See* Brief in Opposition to Petition for Writ of Certioari at pp. 13-16. Further, to the extent that there is any protected speech at issue in this case, in the Court of Appeals, the parties extensively briefed the legitimacy of the District's interest in restricting concededly profane speech in the secondary school context. *See generally* Appellant's Brief, filed in the United States Court of Appeals for the Eighth Circuit, at Section V(B)(3); Appellee's Brief, filed in the United States Court of Appeals for the Eighth Circuit, at Section III(B)(2). The Eighth Circuit ultimately determined that the District's interest in restricting concededly profane speech permitted the District to terminate Petitioner's employment. The Eighth Circuit's findings on this issue are reproduced in the Appendix to the pending Petition for Writ of Certiorari at page 11a. Consequently, this issue is also already before the Court.

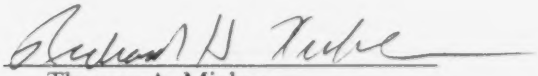
Finally, in their Motion, movants argue that "[t]his Court should review the obviously flawed decision of the Eighth Circuit below, because it raises issues of great import to the governance of the public education system . . . ." There is no credible argument that either

party's arguments minimize or trivialize the importance of the issues raised by this case. To the contrary, the issues before this Court have been extensively briefed before the District Court in summary judgment motions, motions for directed verdict, and a motion for alteration or amendment of the judgment. Further, the parties briefed the same issues before the United States Court of Appeals for the Eighth Circuit in both their primary briefs and in connection with Lacks' motion for reconsideration and rehearing en banc. Finally, the pending Petition for a Writ of Certiorari and the District's opposition thereto clearly frame the issues asserted in the movants' Brief. Consequently, there are no new issues submitted by movants for this Court's consideration.

In light of the fact that movants fail to identify a single issue that is not already before the Court for consideration, the District respectfully suggests that the proffered Brief is only a burden to the Court and does not aid the Court in executing its duties. For these reasons, movants' Motion should be denied. Furthermore, upon review of the materials already before the Court, denial of Petitioner Lacks' Petition for Writ of Certiorari is entirely appropriate.

Respectfully submitted,

BLACKWELL SANDERS
PEPER MARTIN LLP



Thomas A. Mickes
Melanie Gurley Keeney
Richard H. Kuhlman
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
Phone: (314) 345-6000
Facsimile: (314) 345-6060

Attorneys for Respondent Ferguson-Florissant School District, R-2

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Respondent's MEMORANDUM IN OPPOSITION MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE was served upon Lisa S. Van Amburg, Esq., of Van Amburg, Chackes, Carlson & Spritzer, 8420 Delmar Blvd., Suite 406, St. Louis, Missouri 63124, Charles A. Werner, Esq., of Schuchat, Cook & Werner, 1221 Locust Street, Suite 250, St. Louis, Missouri 63101, Jeremiah A. Collins, 1000 Connecticut Avenue, N.W., Suite 1300, Washington, D.C. 20036, and Leon Friedman, 148 East 78th Street, New York, New York 10021 by facsimile and by first class, United States mail, postage prepaid, this 11th day of February, 1999.

Supreme Court, U.S.
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No. 98-983

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CECILIA LACKS,
Petitioner,
v.
FERGUSON-FLORISSANT REORGANIZED SCHOOL DISTRICT, R-2,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

JEREMIAH A. COLLINS *
LEON DAYAN
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

LISA S. VAN AMBURG
VAN AMBURG, CHACKES, CARLSON & SPRITZER
8420 Delmar Boulevard
St. Louis, Missouri 63124

* Counsel of Record

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REPLY BRIEF FOR PETITIONER

In an apparent effort to divert attention from the fact that the Court of Appeals squarely decided two pure questions of law of great importance to First Amendment and Title VII jurisprudence, the Respondent School District ("District") attempts to create the impression that review of the decision below would present routine disputes about questions of fact.

We begin this Reply by removing any doubt that the facts that frame the issues presented are as stated in the Petition. We then establish that nothing in the Brief in Opposition ("Opp.") succeeds in minimizing the worthiness of reviewing the Eighth Circuit's rulings on the important questions of law presented by this case.

THE FACTS

When the jury rendered its verdict in favor of Petitioner Cecilia Lacks, it gave affirmative answers to special interrogatories on both her First Amendment and Title VII claims. Consequently, as the Court of Appeals acknowledged, Lacks was entitled on appeal to have the evidence on both claims "viewed in the light most favorable to the jury's verdict." Pet. App. 13a. The District nevertheless includes in its Brief in Opposition a lengthy recitation of what it denominates "Respondent's Version" of the facts, Opp. at 3, which, far from presenting the evidence in the light most favorable to the verdict, indulges in misrepresentations of key testimony and cites extensively to extra-record material that was not before the jury.[1]

1. The District asserts that Lacks was not terminated simply for failing to discipline her students when they

[1] In particular, the District cites extensively to the transcript of the School Board hearing. *See* Opp. at 4 n.1; *id.* at 6, 7, 8, 9, 10. That transcript—reflecting a hearing that took place before Lacks had been allowed to engage in discovery—was not introduced into evidence at trial.

included profanity in their classroom writing, but for "authoriz[ing]," "approv[ing]" and "set[ting] a climate" for profanity—"if not promoting [such] conduct." Opp. at 5-7, 10. That is not the case. The School Board's written decision announcing the decision to terminate Lacks stated that "the singular charge being pursued was [her alleged] violation of board policy number 3043," Exh. 4, p. 2; and Policy 3043 is the directive that requires school employees to discipline students whose behavior violates the Student Discipline Code. *See* Exh. 96 at 55.

There was not the slightest evidence that Lacks ever affirmatively *encouraged* her students to include profanity in their writing—or even that she had suggested to them the themes, such as gang activity, that led the students, in the drama exercises at issue, to have their fictional characters make use of profanity. *See* Tr. 409-414 (Lacks' uncontroverted testimony describing the play-writing assignment and her instructions to the students). The District's assertion that Lacks "authorized," "approved" or "set a climate" for the use of profanity is based on nothing more than the notion that a teacher who does not take action against students who use profanity in their creative writing *ipso facto* "promotes" profanity. Opp. at 6-7. Whatever verbs the District may choose to employ, the fact remains that the only conduct with which Lacks was charged was that she did not take action against students whose creative works contained profanity.

2. The record, viewed as the jury was entitled to view it, does not support the District's declaration that the use of profanity by Lacks' students was "so pervasive, flagrant and reprehensible as to be beyond comparison to any other student-conducted presentations at the District." Opp. at 8. The jury viewed the tapes of the drama exercises written by Lacks' students, and was able to confirm for itself that, as an expert in student play-writing testified, "[t]he language was appropriate for the characters, and this is language that we have seen in classrooms across the country." Tr. 1181. Unlike the student of another teacher in the District who had received an "A" for writ-

ing a play with characters named "Freddy Fuck" and "Peter Prick," *see* Petition at 6, Lacks' students wrote their scripts with serious intent, Tr. 1180, using profanity not gratuitously or for salacious purposes but to convey a realistic depiction of themes selected by the students that were important to them. *See* Petition at 4.[2]

3. The District asserts that two witnesses called by Lacks condemned the profanity in the drama exercises written by Lacks' students. Opp. at 8-9. But the testimony of those witnesses that is relevant to the questions presented here is their confirmation that the Student Discipline Code was *not* considered to be applicable to students' classroom writing. *See* Petition at 7 (quoting testimony of Karen Price); Tr. 1083 (testimony of Kathryn Nelson that the District's policies prohibited profanity "as part of the behavior code," but "[n]ot in creative writing").

4. The District's misrepresentation of the record reaches its zenith in the following statement in the Brief in Opposition:

> Petitioner's reliance on Vernon Mitchell's statement regarding "black students acting a fool" in the videotapes is misplaced. Even assuming *arguendo* that Mr. Mitchell made this statement, it does not qualify as "direct evidence" of discrimination, as Mr. Mitchell is not a decision-maker and did not refer to *Petitioner's* race.

Opp. at 9-10 (footnote omitted; emphasis in original).

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[2] So too, the jury could see that nothing in the tapes constitutes "simulated acts of sexual intercourse." Opp at 3. Indeed, as regards sexual content, the drama exercises composed by Lacks' students are mild in comparison to the 1992 student-written school-sponsored play, "How Ya Livin'," which was praised by Principal Vernon Mitchell. *See* Petition at 6. (The jury was shown a tape of that play.) The same point holds true with respect to the depictions of gang violence in "How Ya Livin'," which included the graphic desecration of a corpse. Exhs. 247, 248.

That assertion is untrue. As the Eighth Circuit noted, "Mitchell admitted that when he saw the videotape with the students performing their play, his reaction was that it was 'black students acting a fool *and white folks videotaping it.*'" Pet. App. 13a (emphasis added). Mitchell testified at trial that he made that statement in a meeting with one of Lacks' students, to explain to the student what he (Mitchell) saw as "offen[sive]" in Lacks' conduct. Tr. 1392-93, 1426. Mitchell hardly could deny having made the statement, as he had tape-recorded his meeting with the student, and the tape had been provided to Lacks' counsel. Tr. 1392. Contrary to the District's assertion, and its cropped quotation of Mitchell's statement, Mitchell's actual statement describing what "offended" him about Lacks' conduct most definitely *did* refer to Lacks' race.

THE FIRST AMENDMENT NOTICE ISSUE

Until this case, the Ferguson-Florissant Student Discipline Code never had been applied to students' use of profanity in creative writing, and neither teachers nor administrators had understood the Code to have any application in that context. *See* Petition at 5-8. The Eighth Circuit held that, "as a matter of law," such evidence could not sustain the jury's finding that Lacks had not received the reasonable notice that is required by the First Amendment before a teacher may be fired for her speech activities, because it is linguistically possible to construe the Student Discipline Code as applying to classroom writing. Pet. App. 11a. *See* Petition at 17-18.

Thus the Eighth Circuit adopted the position that citizens must "t[ake] the risk," Pet. App. 11a, that the government will extend a policy prohibiting speech to the furthest possible reach of the policy's literal terms, no matter how strong the evidence may be that that is not the true intent of the policy.

None of the District's efforts to defend the Court of Appeals' decision on this point provides any cogent reason why the decision does not warrant review by this Court.

1. Contrary to the District's suggestions, *see* Opp. at 13-14 and nn. 5, 6, a requirement of reasonable notice does not conflict with a school board's authority to make decisions regarding school policy and curriculum. The question presented here is not whether a school district may *adopt* a policy prohibiting profanity in students' classroom writing and requiring teachers to enforce the prohibition, but simply whether a district that chooses to adopt such a regime must give *reasonable notice* that it has done so.

2. Quixotically, the District argues that this case does not merit review because determining the adequacy of notice for First Amendment purposes is a "fact-specific" matter that must be assessed "case-by-case." Opp. at 18. Yet the error of the court below consisted of ignoring that very point: after hearing a great deal of testimony on how Policy 3043 had been understood and applied in practice during Lacks' 20-plus years as a teacher, the jury made a "fact-specific" determination that Lacks had not received reasonable notice; the Eighth Circuit overturned that finding because, on its view, reasonableness of notice is to be decided "as a matter of law" solely by parsing the text of the written policy invoked by the government.

3. Similarly off the mark is the District's contention that Lacks' position would require an undue level of specificity in school board policy documents. *See* Opp. at 14-19. Lack's case is *not* based on a mere lack of specificity in the text of the Student Discipline Code, but on a wealth of evidence as to how the Code *had in fact been understood and enforced*. *See* Petition at 5-10.

4. At bottom, the District's position is that Lacks had no First Amendment right to notice at all, because, in the District's eyes, notice is simply an issue of due process. *See* Opp. at 15, 19.[3] That contention is untenable. Where

[3] The District goes so far as to intimate that the notice question is not before the Court because Lacks did not appeal the District Court's pre-trial grant of summary judgment against her on a procedural due process claim. *Id.* As the District well knows, that

a teacher is threatened with termination because of speech activities, reasonable notice is required "[b]ecause *First Amendment freedoms* need breathing space to survive." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (emphasis added) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)). This is true even if the teacher has no property interest in continued employment, as was the case in *Keyishian* itself. *See* 385 U.S. at 592 (noting that Mr. Keyishian was an untenured "instructor in English" with a "one-year term contract"). *See also Ward v. Hickey*, 996 F.2d 448, 450, 454 (1st Cir. 1993) (a "non-tenured biology teacher" had "a First Amendment right . . . to know what conduct is proscribed").

Indeed, the court below accepted all of this. Pet. App. 10a (citing *Ward*).[4] Yet, by treating the reasonableness

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claim concerned the adequacy of the *hearing procedures* provided to Lacks. It had nothing to do with the First Amendment notice issue. Indeed, the District agreed at trial that the question whether Lacks had received reasonable notice as required by the First Amendment was a matter that should be submitted to the jury, Tr. 2065, and the Eighth Circuit, of course, reached the merits of that issue.

[4] Nor did the court below adopt the suggestion now advanced by the District that Lacks was not entitled to any First Amendment protection because her own speech was not restrained and her students' plays constituted unprotected "obscene" speech. *See* Opp. at 13 n.4. The District's suggestion is without substance. This Court repeatedly has held that a person who facilitates the speech of others is protected by the First Amendment even if his or her own expression of ideas is not at stake. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995). A teacher's refraining from censoring student speech is a particularly compelling example of such protected activity. *See Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). Furthermore, the District did not contend at trial, much less did the jury find, that the classroom writings of Lacks' students fit the constitutional definition of "obscenity;" nor, in any event, would such a finding have meant that the First Amendment afforded her no protection against being terminated without reasonable notice for not disciplining the students. *See Smith v. California*, 361 U.S. 147, 155 (1959); *McKinney v. Alabama*, 424 U.S. 669, 673-674 (1976).

of notice as a matter to be resolved merely by determining, in a linguistic vacuum, whether it is possible to construe a school board policy as reaching a teacher's speech, the Eighth Circuit has adopted a position in conflict with that of other circuits, *see* Petition at 18-22, and has endorsed an approach under which teachers who do not wish to "t[ake] the risk" of punishment, Pet. App. 11a, will necessarily "steer far wider of the unlawful zone," *Keyishian*, 385 U.S. at 604 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958), thus fostering the very kind of chilling effect that the First Amendment notice requirement is intended to prevent.

THE TITLE VII EMPLOYER-RESPONSIBILITY ISSUE

Echoing the Court of Appeals, the District argues that the jury verdict for Lacks on her race discrimination claim could not stand because the two administrators whom the jury could find to have acted out of racial animus—Principal Mitchell and Assistant Superintendent Wright—"did not participate in the Board's deliberations regarding the termination of Petitioner's employment." Opp. at 21. *See also id.* at 6 (emphasizing that "race was never considered, or even mentioned, as part of the Board's deliberations").

The proposition that a school district should not be held liable for a supervisor's racial discrimination against an employee unless the deliberations of the district's governing body are themselves directly predicated on race would have some force if this case arose under § 1983, § 1981, or Title IX, *see* Petition at 23-24; and at least one judge has suggested that such a limitation should apply under Title VII as well. *See Simpson v. Diversitech*, 945 F.2d 156, 162-63 (6th Cir. 1991) (Kennedy, J., dissenting). But, until the decision in this case, no court of appeals had adopted that position with respect to Title VII, which, unlike those other statutes, "explicitly defines 'employer' to include 'any agent'." *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1996 (1998).

The court below did not deny that the jury properly could have found that Mitchell and Wright, who unquestionably are agents of the District, discriminated against Lacks because of her race. *See* Pet. App. 13a. Furthermore, the jury explicitly found that "plaintiff's race was a motivating factor in her termination," and that the District had not "proven by the preponderance of the evidence that [it] would have discharged Lacks regardless of her race." The jury properly could have based those findings as to causation on two grounds, neither of which the Eighth Circuit declared to be factually unsupported.

First, considering Mitchell's approval of the production by an African-American teacher of the play "How Ya Livin'," *see supra* note 2, and Mitchell's admission that what offended him about the drama exercises of Lacks' students was that "white folks videotap[ed] it," *see supra* at 4—together with other evidence of racial animus and of the District's past tolerance of profanity in creative writing, *see* Petition at 5-11—the jury could find that the charges against Lacks *never would have come before the Board* but for the racially motivated actions of Mitchell and Wright in causing the charges to be filed and pursued.[5]

Second, as the Eighth Circuit acknowledged, in the administrative hearing "[t]he school board . . . heard testimony from . . . Mitchell that he told Lacks that profanity was not permitted in the school newspaper," and "[w]hen the board issued its opinion terminating Lacks' contract, it based its decision in part on its finding that Lacks had

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[5] The charges were drafted by Wright (for the signature of Superintendent Fritz), on the heels of an investigation triggered and conducted by Wright and Mitchell—the very investigation in which Mitchell explained to a student that what was offensive was that "white folks" had taped the drama exercises of "black students." In the meeting of the Superintendent's cabinet in which the results of the investigation were discussed and the decision was made to file charges, Mitchell recommended that Lacks be terminated. Hrg. Tr. 801 (excerpt read into the record at trial, *see* Dist. Ct. Dkt. No. 130).

been warned about the use of profanity by Mitchell." Pet. App. 7a-8a. It therefore is simply false for the District to declare that "the Board did not rely on, defer to, or in any other way base its decision to terminate Petitioner's employment on anything submitted by either of the allegedly biased administrators." Opp. at 25.

Mitchell's testimony about those alleged warnings was crucial to the Board's decision to terminate Lacks. Under Missouri law, the Board could vote to terminate only if it found that Lacks had *willfully* violated Board policy. As the court below observed, this required the Board to find "an intent to violate or disobey a particular regulation," meaning that the Board had to find "that Lacks . . . knew that the board policy applied to the profanity used by her students." Pet. App. at 6a. Mitchell's testimony was the *only* evidence cited in the Board decision that purported to establish such "willfulness" on Lacks' part. *See* Exh. 4 (Board Decision) at 4.

The Court of Appeals recognized that the jury could find that Mitchell lied when he claimed to have warned Lacks about profanity in the newspaper. *See* Pet. App. 11a.[6] And the jury could find as well that Mitchell's racial animus against Lacks was what caused him to provide the Board with a false basis for terminating her.

Both of the means by which Mitchell and Wright acted to harm Lacks—by causing charges to be pursued, and by Mitchell's false testimony upon which the Board relied—have been held by other circuits to constitute grounds upon which an employer can be held liable under Title VII despite an absence of discriminatory intent on the part of the employer's ultimate decisionmakers. *See* cases cited in the Petition at 28-29.[7] The Eighth Circuit's decision

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[6] In fact, it was established at trial that Mitchell's testimony to the Board about the alleged warnings was entirely false. *See* Petition at 12 and n.11.

[7] There is no basis for the District's contention that the Eighth Circuit's decision could be sustained on the theory that "[the] causal link between the alleged bias of Petitioner's supervisors

rejecting liability creates a circuit conflict on a question of exceptional importance to the administration of Title VII. *See* Petition at 25-30. The need for guidance from this Court is particularly acute because none of the numerous court of appeals decisions on this subject has articulated a cogent rationale for determining when the innocence of an employer's top decisionmakers should absolve the employer of liability under Title VII for an adverse employment action engineered by biased subordinate officials. *See* Petition at 25-28.[8] Clarification urgently is needed of the principles that should govern the myriad of Title VII cases in which an employment action is the joint product of biased subordinates and innocent superiors.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the Court should grant the Petition for Certiorari.

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and the Board's ultimate decision is broken by the Board's independent action." Opp. at 22. As we have shown, the board's "ultimate decision" placed crucal reliance on Mitchell's false and racially motivated testimony. And, if Mitchell and Wright had not caused charges to be filed in the first place, there never would have been any "ultimate decision" of the Board to terminate Lacks.

[8] An apt illustration is the Seventh Circuit's recent decision in *Willis v. Marion County Auditor's Office*, 118 F.3d 542 (7th Cir. 1998), cited in the Brief in Opposition at 24. That decision confounds the analysis of this issue by treating the question as one of "imput[ing] the discriminatory motive of the biased subordinate, as opposed to the motives of the ignorant decisionmaker, to the company." *Id.* at 547. The *Willis* court goes on to state that "[t]his court has not yet had an occasion to set in any definitive way the outer contours" of what the decision characterizes as an "exception" to the general rule that "de facto authority [should not be] allowed to trump de jure authority." *Id.*

Respectfully submitted,

JEREMIAH A. COLLINS *
LEON DAYAN
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

LISA S. VAN AMBURG
VAN AMBURG, CHACKES,
CARLSON & SPRITZER
8420 Delmar Boulevard
St. Louis, Missouri 63124

* Counsel of Record